Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

M.Y.J.P.,

Petitioner,

v.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,

Respondent.

On Petition For Writ Of Certiorari To The New Jersey Supreme Court And The New Jersey Superior Court, Appellate Division

PETITION FOR WRIT OF CERTIORARI

MARTY M. JUDGE
Counsel of Record
MARK P. LUEDEKE
DRINKER BIDDLE & REATH LLP
105 College Road East
Suite 300
Princeton, New Jersey 08542
(609) 716-6500

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QUESTIONS PRESENTED

1. Whether footnote number 30 in the United States Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), created or acknowledged a "status" exception to excuse compliance with the "minimum contacts" requirement for *in personam* jurisdiction as stated in *International Shoe* and its progeny, in a termination of parental rights matter.

2. Whether a New Jersey court's assertion of *in personam* jurisdiction over a foreign citizen for purposes of terminating that foreign citizen's parental rights as to a child who now resides in New Jersey offends "traditional notions of fair play and substantial justice" where the foreign citizen has never been to New Jersey or the United States and whose only contacts with New Jersey consisted of minimal communications with a state agency directly in response to the state agency's communications.

3. Whether a foreign citizen's Fourteenth Amendment procedural due process rights are violated when a New Jersey trial court, hearing a termination of parental rights matter, fails to allow for that foreign citizen's presence or meaningful participation during the trial.

LIST OF PARTIES

M.Y.J.P.

The New Jersey Division of Youth and Family Services

J.R.A. (Party to the Proceedings Below)

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OPINIONS BELOW

The New Jersey Supreme Court's unreported order denying M.Y.J.P.'s Petition for Certification is reprinted in the Appendix ("App.") at 125a-126a. The New Jersey Superior Court, Appellate Division's opinion affirming the trial court's termination decision is reported at 360 N.J. Super. 426 and reprinted at App. 1a-53a. The unreported opinion and order of the New Jersey Superior Court, Chancery Division, terminating M.Y.J.P.'s parental rights are reprinted at App. 54a-103a. The unreported order of the New Jersey Superior Court, Chancery Division, modifying trial procedures is reprinted at App. 104a-106a. The unreported order of the New Jersey Superior Court, Chancery Division, again modifying trial procedures is reprinted at App. 107a-109a. The unreported order of the New Jersey Superior Court, Chancery Division, setting original trial procedures is reprinted at App. 110a-111a. The New Jersey Supreme Court's unreported order denying M.Y.J.P.'s motion for interlocutory appeal is reprinted at App. 112a. The New Jersey Superior Court, Appellate Division's unreported order denying M.Y.J.P.'s motion for interlocutory appeal is reprinted at App. 113a-114a. The New Jersey Superior Court, Chancery Division's unreported opinion and orders denying M.Y.J.P.'s motion to dismiss for lack of *in personam* jurisdiction is reprinted at App. 115a-124a.

JURISDICTION

The order of the New Jersey Superior Court, Chancery Division, terminating the parental rights of M.Y.J.P. was entered on February 20, 2002. The New Jersey Superior Court, Appellate Division, affirmed the trial court

decision on May 27, 2003. The New Jersey Supreme Court's order denying M.Y.J.P.'s Petition for Certification was entered on September 17, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Background

M.Y.J.P., a Haitian national, is the mother of S.J.A., the child at the heart of this legal action. *See* App. at 2a. To this day, M.Y.J.P. resides in Haiti and has never been to New Jersey or the United States. *See id.* at 62a. J.R.A., also a Haitian national, is the father of S.J.A. *See id.* M.Y.J.P. and J.R.A. were never married. J.R.A. had been a teacher at M.Y.J.P.'s school in Port-au-Prince, Haiti in 1990. *See id.* at 63a. In addition to his role as a teacher,

J.R.A. was employed as part of Haitian President Jean-Bertrand Aristide's security service. M.Y.J.P. became pregnant with S.J.A. in November 1991, during a period of extreme civil unrest in Haiti following the forced abdication of President Aristide in September 1991. Because of the political chaos in Port-au-Prince, M.Y.J.P. moved to her parents' home in L'Acul du Nord, Haiti in March 1992. S.J.A. was born in L'Acul du Nord on August 5, 1992. *See id.* at 62a.

At the request of J.R.A., M.Y.J.P. and S.J.A. moved back to Port-au-Prince in May 1994. *See id.* at 3a. The continued political unrest and the United States embargo made it difficult for M.Y.J.P. to care for S.J.A. *See id.* In May 1994, J.R.A. approached M.Y.J.P. and asked that he be permitted to take S.J.A., then 21 months of age, to the United States. *See id.* J.R.A. promised that he would send for M.Y.J.P. once he arrived and settled in the United States. *See id.* J.R.A. did not indicate where in the United States he intended to settle. While the record is unclear as to whether M.Y.J.P. was aware that J.R.A. was married to another woman at the time and that he intended to bring his wife with him to the United States, it is clear that M.Y.J.P was deceived by J.R.A. into allowing S.J.A. to be brought to the United States under the pretense that she would soon join them.

Soon after arriving in the United States and settling in New Jersey, J.R.A. breached his promise to send for M.Y.J.P., leaving her stranded in Haiti and unable to see or communicate with S.J.A. J.R.A. also breached his promise to care for S.J.A. and, as a result, S.J.A. was placed with the New Jersey Division of Youth and Family Services ("DYFS") on November 16, 1994. *See id.* at 70a.

From the date of S.J.A.'s placement with DYFS on November 16, 1994 through June 18, 1998, the date that DYFS mailed its Guardianship Complaint to M.Y.J.P. in Haiti, DYFS made virtually no attempt to keep M.Y.J.P. informed about the status of S.J.A. or to assist her in involving herself in the life of her son. DYFS sent no progress reports, copies of school records or medical records to M.Y.J.P.

More importantly for the purposes of this Petition, during that period, the only contacts that M.Y.J.P. had with DYFS were in response to communications from DYFS. To that end, in April 1995 M.Y.J.P. spoke to DYFS through a Creole interpreter after DYFS initiated contact in March 1995. *See id.* at 13a. M.Y.J.P. also sent DYFS a letter indicating her address and a telephone number at which she could be reached, but other than one instance in which DYFS sent M.Y.J.P. photographs of S.J.A., DYFS did not contact M.Y.J.P. again until 1997. In 1997, DYFS sent M.Y.J.P. a letter indicating that DYFS was considering adoption as an option for S.J.A. Then, on March 16, 1998, DYFS sent M.Y.J.P. a letter notifying her that DYFS was in the process of petitioning the court for Guardianship of S.J.A. *See id.* at 15a. M.Y.J.P. responded to this letter stating that she was waiting for the court's papers and also requesting photographs of her son. *See id.* On June 18, 1998, DYFS sent M.Y.J.P. a letter transmitting the summons and Guardianship Complaint. In response, M.Y.J.P. wrote a letter requesting that counsel be appointed for her. In the letter, she provided a telephone number where she could be reached and again requested photographs of her son. DYFS did not respond to the letter.

It is undisputed that M.Y.J.P. has never visited the United States, much less New Jersey, nor has it been alleged that she has had contact with anyone in New Jersey other than the letter responses she sent to DYFS. In fact, the entire extent of M.Y.J.P.'s contacts with New Jersey were exactly three letters to DYFS three years apart. Those letters were written in response to exactly three letters from DYFS during those same three years. Additionally, M.Y.J.P. had exactly two telephone conversations with DYFS through an interpreter, both in 1995, in response to a 1995 letter from DYFS.

Procedural History

A. The Trial Court Proceeding

DYFS filed its Complaint in this case on June 4, 1998. *See id.* at 5a. By a December 9, 1998 order of the trial court, Marty M. Judge, Esq., of the law firm of Drinker Biddle & Reath LLP was appointed as pro bono counsel for M.Y.J.P. During his first court appearance at a case management conference on January 14, 1999, M.Y.J.P.'s assigned counsel raised the issue of sufficiency of *in personam* jurisdiction. The trial court memorialized that the issue of *in personam* jurisdiction would be preserved by order dated January 28, 1999.

Thereafter, pursuant to a lengthy briefing schedule established by the trial court, the parties briefed the jurisdictional issue. On February 15, 2000, the trial court conducted a telephonic oral argument on the jurisdictional motion. The trial court thereafter released to counsel a written opinion on March 22, 2000, denying M.Y.J.P.'s jurisdictional motion. *See id.* at 115a-122a.

At the request of counsel for M.Y.J.P., the trial court initially delayed issuance of a filed order officially denying M.Y.J.P.'s motion to dismiss for lack of jurisdiction so that counsel could discuss the possibility of an interlocutory appeal with M.Y.J.P. This delay was necessary due to communication problems which continued throughout the proceeding below.[1] The trial court officially entered the order denying the jurisdictional motion on September 12, 2000. *See id.* at 124a. M.Y.J.P. filed a timely motion for leave to appeal with the New Jersey Appellate Division on October 2, 2000. Leave to appeal was denied by the Appellate Division on November 2, 2000. *See id.* at 113a-114a. On November 22, 2000, M.Y.J.P. filed with the New Jersey Supreme Court a motion for leave to appeal and for a stay pending the appeal. This motion was denied on December 18, 2000, albeit with two New Jersey Supreme Court Justices voting to hear the matter. *See id.* at 112a.

On February 25, 2001 and March 8, 2001, M.Y.J.P. filed briefs in support of her motion to establish protective trial procedures. After a case management conference with the trial court on March 12, 2001, the court entered an order dated March 13, 2001 establishing certain trial procedures designed to satisfy M.Y.J.P.'s due process rights. *See id.* at 110a-111a. Specifically, the court ordered that: (1) M.Y.J.P. participate in the trial via telephone and translator, in consideration of her unsuccessful attempt to obtain a United States State Department visa to travel to New

[1] M.Y.J.P. resides in an impoverished area of Port-au-Prince, Haiti and normally does not have access to a telephone. In addition, she speaks only Creole, and it is necessary to engage a translator each and every time counsel wishes to speak with her.

Jersey for the trial; (2) that M.Y.J.P. be permitted to request brief adjournments to confer with her counsel; and (3) that the Court require all witnesses and counsel to be cognizant and cooperate with the translator so as to ensure that M.Y.J.P. received an accurate translation of the trial. *See id.*

The trial court informed all parties that the Administrative Office of the Courts would be responsible for making the arrangements for M.Y.J.P.'s telephonic participation at trial. On March 30, 2001, the Mercer County Trial Court Administrator testified to the Court that despite his and his office's best efforts, it was impossible to arrange for M.Y.J.P. to participate telephonically at trial. Moreover, the Administrator testified that it was impossible for M.Y.J.P. to provide videotape testimony because of the lack of any infrastructure in Haiti to support that approach. Further, the Administrator testified that he had attempted to convince the State Department that the Administrative Office of the Courts would provide adequate safeguards to assure that M.Y.J.P. would return to Haiti if she were allowed to travel to New Jersey for trial. Despite these efforts, the State Department refused to grant M.Y.J.P. a visa to travel to the United States to prepare for and attend the trial. Thus, the trial court was unable to provide the trial procedures outlined in its March 13, 2001 order. As a substitute, the trial court allowed trial transcripts to be translated and sent to Haiti and then allowed witnesses to be recalled by M.Y.J.P.'s attorneys during the trial. *See id.* at 107a-109a. However, M.Y.J.P. was never physically present during the trial itself.

Based upon the trial court's inability to provide the above-referenced procedural safeguards that it itself had

instituted, M.Y.J.P. moved to dismiss this action on May 31, 2001 for the reason that the matter could not be tried in a manner consistent with M.Y.J.P.'s constitutionally protected Fourteenth Amendment due process rights. This motion was denied by the trial court on July 18, 2001. *See id.* The trial in this matter took place on August 6 and 7 and September 10-12, 2001. Closing arguments were heard on December 3, 2001. On February 1, 2002, the trial court issued an opinion terminating M.Y.J.P.'s parental rights. *See id.* at 54a-103a. The termination order was entered on February 20, 2002. *See id.* at 102a-103a.

B. The Appellate Division Proceeding

M.Y.J.P. filed a timely notice of appeal to the New Jersey Appellate Division on April 4, 2002. The Appellate Division denied the appeal on May 27, 2003. *See id.* at 1a-53a.

As to the issue of *in personam* jurisdiction, the Appellate Division, citing to footnote 30 in the United States Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), held that "M.Y.J.P.'s conduct and related facts subjected her parental status to the jurisdictional sway of this State under the status exception, notwithstanding that she, herself, has never been present here." *See id.* at 37a. After holding that DYFS did not need to establish that M.Y.J.P. had "minimum contacts" with New Jersey because of the so-called status exception, the Appellate Division nonetheless also held that:

> Even though we have determined that the trial court's judgment was a valid adjudication of issues over which the State had acquired subject

> matter jurisdiction as well as personal jurisdiction by reason of the status exception, we are also persuaded that personal jurisdiction had been acquired over M.Y.J.P. in the conventional sense sufficient to overcome the preclusionary feature of the 'minimum contacts' principal.

Id. at 37a-38a.

The Appellate Division also rejected M.Y.J.P.'s arguments with respect to the procedural due process issue. Despite acknowledging both that "[t]he record discloses that the court made efforts to arrange for M.Y.J.P. either to attend the trial or to participate telephonically, but was unable to effect either alternative" and that "procedural requirements are more demanding in parental termination cases than in ordinary civil actions", the Appellate Division held that "the process accorded to M.Y.J.P. was adequate to protect her interests, and there is no indication that any procedural safeguards could have been implemented that would have been more fulfilling." *Id.* at 43a-50a.

C. The New Jersey Supreme Court Proceeding

M.Y.J.P. filed a timely Petition for Certification to the New Jersey Supreme Court on June 26, 2003. The New Jersey Supreme Court denied the Petition for Certification, without an opinion, on September 17, 2003. *See* App. at 125a-126a.

REASONS FOR GRANTING THE PETITION

I. THE NEW JERSEY APPELLATE DIVISION ERRED IN APPLYING A "STATUS" EXCEPTION TO THE WELL-SETTLED REQUIREMENT THAT A DEFENDANT HAVE "MINIMUM CONTACTS" WITH A STATE IN ORDER FOR THAT STATE'S COURTS TO ASSERT *IN PERSONAM* JURISDICTION OVER THE DEFENDANT.

For more than a half century, it has been the law of the United States and New Jersey that in order for a state court to assert *in personam* jurisdiction over a defendant, that defendant must have "minimum contacts" with the state seeking to assert jurisdiction. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). The United States Supreme Court clarified the meaning of "minimum contacts" in 1980 when it stated that the term consisted of *purposeful* acts by that party, directed toward a state, which make it reasonable for the defendant to "anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The Court's use of the word "purposeful" undoubtedly reflected the Court's intention to insert the element of scienter into the requirement of "minimum contacts." *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (holding that a defendant must have "deliberately" engaged in "significant" activity within the forum and jurisdiction cannot be asserted based upon "random," "fortuitous," or "attenuated" contacts). Even in an *in rem* or *quasi in rem* proceeding, the defendant must still have sufficient minimum contacts with the forum State before that state is able to exercise jurisdiction. *See Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

The New Jersey Appellate Division's decision to obviate the need for "minimum contacts" in a termination of parental rights case, based upon vaguely worded dicta in footnote 30 in *Shaffer* ignores a half century of *in personam* jurisdiction law in the United States and directly contravenes the binding authority of the Supreme Court's opinion in *International Shoe* and its progeny. Additionally, there now exists among the courts of the various states a decided split over whether states may exercise the so-called "status" exception of *Shaffer* in a termination of parental rights matter or whether states must establish that the parent, whose rights are to be terminated, has had "minimum contacts" with that state. Thus, the issue is ripe for review by this Court. Further, because the split on this matter stems exclusively from a cryptic one sentence footnote in a decision made by this Court 58 years ago, only this Court can clarify the meaning of footnote 30 in *Shaffer*.

The Appellate Division's reliance upon *Shaffer* to affirm the holding of the trial court and the New Jersey Supreme Court's acquiescence to this decision is incorrect for several reasons. First, there is, or should be, substantial doubt as to whether the United States Supreme Court actually created a "status" exception in *Shaffer* at all. Footnote 30 of that decision merely states that "[w]e do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudication of status, are inconsistent with the standard of fairness." 433 U.S. at 209 n.30. This language is, by its very wording, dicta and not integral to the central holding in *Shaffer*. It is simply wrong to assume that such language rises to the level of Constitutional doctrine. A fairer reading of the *Shaffer* decision demonstrates that

the Supreme Court was unequivocal: "[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny [(i.e., minimum contacts analysis)]." *Shaffer*, 433 U.S. at 212. Nothing in *Shaffer* detracts from the ultimate holding that sufficient minimum contacts are a predicate for state court jurisdiction in all cases. *See, e.g., May v. Anderson*, 345 U.S. 528 (1953) (holding that an Ohio court was not required to accord full faith and credit to a custody decision rendered in Wisconsin because that court failed to acquire personal jurisdiction over the mother).

Second, even if the Court in *Shaffer* intended to create or acknowledge a "status" exception, such an exception would not apply in termination of parental rights cases. The *Shaffer* decision had absolutely no relation to termination of parental rights issues. There, the Court was faced with the issue, in a shareholder derivative suit, of whether a state statute permitting Delaware courts to take jurisdiction of a lawsuit by sequestering the defendant's property located in that state violated the due process clause of the Fourteenth Amendment. Neither the United States Supreme Court nor any New Jersey court (until the Appellate Division's decision in this case) has ever held that there is a "status" exception to the *in personam* jurisdiction requirement of "minimum contacts" in a termination of parental rights matter. To the contrary, parents facing termination of parental rights are entitled to a greater degree of Fourteenth Amendment due process protection than other civil litigants, not the complete nullification of those Constitutionally protected rights by way of a vaguely-worded exception. This Court has recognized that "[i]f anything, persons faced with forced dissolution of their parental rights have a more critical need for

procedural protections than do those resisting state intervention into ongoing family affairs." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

Third, the Appellate Division's reliance on its prior child custody decision in *Genoe v. Genoe*, 205 N.J. Super. 6 (App. Div. 1985), and the other child custody cases cited by it is misplaced. *Genoe* had looked to footnote 30 in *Shaffer* to determine that a jurisdictional basis to proceed existed notwithstanding the possible absence of minimum contacts in a custody matter. *Id.* at 13. However, the very purpose of an adjudication in a child custody case is a status determination – that is, the status of the child's custody and care. By contrast, the determination in a termination of parental rights case is the parent's right to continue to be a parent of a child at all. Such is a personal right stemming from the fact that the parent conceived a child, and the parent continues to have a blood tie to the child no matter who may be entrusted with the child's immediate care or custody. This Court has recognized the inherent distinction between loss of custody and termination of parental rights. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) ("[i]n contrast to loss of custody, which does not sever the parent-child bond, parental status determination is 'irretrievably destructive' of the most fundamental family relationship."); *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 40 (1981) (Blackmun, J., dissenting) ("termination of parental rights by the State is a 'unique kind of deprivation.'"). To seek to extinguish that right without at least requiring that the parent have "minimum contacts" with the forum in which the action to terminate reposes does, indeed, "offend traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. The mere fact that the child may reside in the forum state

does not transform the matter into a determination of "status."

Fourth, as noted above, there is presently a split among the courts of the various states as to whether a state needs to establish minimum contacts in a parental termination case or whether a state can assert a "status" exception as the basis for jurisdiction. An examination of the relevant decisions of other courts deciding this issue demonstrates that those courts requiring "minimum contacts" in a termination of parental rights case are the more well-reasoned decisions. In *In re Interest of Doe*, 926 P.2d 1290 (Haw. 1996), the Hawaii Supreme Court, faced with a factual situation similar to that presented in this case, held that a mother domiciled in the Philippines needed to have "minimum contacts" with Hawaii in order for the Hawaiian court to assert jurisdiction over her. *See id.* at 1297. The court correctly noted that "[i]n order for an exercise of jurisdiction . . . to be valid, however, it must comply with federal due process requirements. A court's power to exercise jurisdiction over non-residents is limited by the operation of the fourteenth amendment's due process clause." *Id.* at 1296.

The decisions of other state courts are in accord with *Doe*. In *In re Trueman*, 393 S.E.2d 569 (N.C. Ct. App. 1990), the father's only contact with North Carolina was that his child had been brought to the state by his former wife and that his child support payments were sent to North Carolina under a Wisconsin court order. *See id.* at 580. Observing "the constitutional requirement that a state's exercise of jurisdiction over a nonresident must be consistent with due process under the standard established by *International Shoe*", the court held that it was "obliged to hold that the meager contacts this respondent

has had with the state are insufficient to support the exercise of jurisdiction over him in this proceeding. . . . " *Id.* at 581.

Similarly, in *D.L.C. v. C.A.H.*, 764 So. 2d 562 (Ala. Ct. App. 1999), a mother who recently had moved from Texas to Alabama with her child sought to terminate the father's parental rights in Alabama. Noting that "[t]he parties have never lived here together, the child was not born here, and the father has never resided here", the court of appeals reversed the termination decision, holding that "[t]he mother's unilateral action in moving to Alabama from Texas cannot satisfy the requirement that the father have certain 'minimum contacts' with Alabama." *Id.* at 565. *See also In re Termination of Parental Rights of a Child*, 991 P.2d 986, 988 (N.M. Ct. App. 1999) (rejecting the argument that a termination matter "presents a status adjudication over which no personal jurisdiction over the parties is required"); *In re Interest of M.A.C.*, 261 S.E.2d 590, 595-96 (Ga. 1979) (applying a "minimum contacts" analysis in a termination of parental rights matter); *In re Termination of Parental Rights of Laurie R.*, 760 P.2d 1295, 1296-97 (N.M. Ct. App. 1988) (same).

Conversely, those courts applying the "status" exception in termination of parental rights cases have failed to grasp the gravity, finality and uniqueness of termination cases that this Court has recognized. *See In re Interest of M.L.K.*, 768 P.2d 316, 319 (Kan. Ct. App. 1989) (taking the position that termination of parental rights cases are no different than divorce or custody cases); *In re Adoption of Copeland*, 43 S.W.3d 483, 487 (Tenn. Ct. App. 2000) (similarly holding as to custody cases). The assertion that termination of parental rights cases are akin to divorce or custody matters is spurious. A divorce action may be an

extinguishment, but it is merely the dissolution of a union between adults that, but for the legal recognition of marriage, would not require dissolution at all. While a custody proceeding determines with whom the child will live, a parent who fails in a custody hearing will still retain parental rights and will have the ability, upon changed circumstances, to revisit the custody issue. Conversely, the right to parent a child is a "fundamental liberty interest protected by the Fourteenth Amendment." *Santosky*, 455 U.S. at 753. The right to raise one's child has been described by this Court as "essential,"[2] "basic civil rights of man,"[3] and "rights far more precious ... than property rights."[4] In contrast to both the divorce and custody situations, a parental rights termination extinguishes a parent's natural right even to be a parent as to her child. The parent has no choice in the matter, and when judgment is rendered, she has no further rights vis-à-vis her own child.

It should be noted that the Appellate Division based its decision, in part, on its recognition that "New Jersey follows the majority approach in cognate matters that personal jurisdiction is not required to modify an order for custody or visitation under the Uniform Child Custody Jurisdiction Act ("UCCJA") N.J.S.A. 2A:34-28 to -52." App. at 35a.[5] While that statement may be true, it is irrelevant

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[2] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[3] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[4] *May v. Anderson*, 345 U.S. 528, 533 (1953).

[5] The Uniform Child Custody Jurisdiction Act was also the basis for the Wisconsin Supreme Court's holding in *In re Termination of Parental Rights to Thomas J.R.*, 663 N.W.2d 734 (Wis. 2003), that jurisdiction, in a termination of parental rights case, could be established pursuant to the supposed "status" exception in footnote 30 of *Shaffer*.

in the context of this matter. The UCCJA was passed to "[p]romote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child." N.J.S.A. 2A:34-29(b). However, this case does not concern an inquiry into which, among several, states may have the jurisdiction to hear a custody case. This is a termination matter. *See In re Termination of Parental Rights of a Child*, 991 P.2d at 988 (refusing to extend the application of the New Mexico CCJA to a termination of parental rights matter). Further, M.Y.J.P. is not subject to the reach of the UCCJA, and Haiti, as a foreign country with whom the United States does not even have a custody or visitation treaty, has not subjected itself, or its citizens, to the terms of that act. *See, e.g., Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 638 (2d Cir.) (holding that "[t]he result sought – extraterritorial application of American law – is contrary to usual conflict-of-laws principles."), *cert. denied*, 352 U.S. 871 (1956).

II. THE COURT BELOW ERRED IN AFFIRMING THE DETERMINATION THAT NEW JERSEY COURTS HAVE *IN PERSONAM* JURISDICTION OVER M.Y.J.P.; THE TRIAL COURT DID NOT HAVE THE NECESSARY JURISDICTION BECAUSE M.Y.J.P. DOES NOT HAVE SUFFICIENT "MINIMUM CONTACTS" WITH THE STATE OF NEW JERSEY.

In order for a state court to exercise *in personam* jurisdiction, a defendant must have *purposely* availed herself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of

its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Moreover, "the unilateral activity of those who claim some relationship with a non-resident cannot satisfy the requirement of contact with the forum state . . . ." *Kulko v. Superior Court of California*, 436 U.S. 84, 93 (1978); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (holding that *in personam* jurisdiction cannot be based on the "unilateral activity of another party or a third person").

The decisions of the courts below directly contradict the United States Supreme Court's decision in *Kulko*. In *Kulko*, the Court held that an out-of-state father in a custody suit who, "in the interests of family harmony and his children's preferences," allowed his children to remain in California did not, by virtue of his acquiescence to that arrangement, " 'purposely avail[ ] himself' of the 'benefits and protections' of California's laws." *Id.* at 94. In the case of M.Y.J.P., the argument for the lack of existence of *in personam* jurisdiction is even more compelling than it was in *Kulko*.

First, S.J.A.'s presence in New Jersey was beyond M.Y.J.P.'s control. Though M.Y.J.P. knew that S.J.A. was being taken to the United States by J.R.A., M.Y.J.P. certainly had no knowledge that S.J.A. was being taken to New Jersey. The "purposeful availment" requirement applies not to the United States as a whole, but to the particular state that seeks to assert jurisdiction over a defendant. Moreover, the Supreme Court in *Kulko* clearly held that permitting a child to be brought to another state does not constitute an act sufficient to satisfy minimum contacts. *Kulko*, 436 U.S. at 94. Further, the record in this

case undoubtedly establishes that even if M.Y.J.P. had pled for S.J.A.'s return to Haiti when she learned of his presence in New Jersey in 1995, DYFS would not have allowed his return to her, because the case had been "red-flagged" (i.e., DYFS would not return a child to Haiti under any circumstances).

Second, none of the courts below adequately took into consideration an important factor that seemingly was lost in their focus on searching for ways to uphold jurisdiction – to establish jurisdiction, there must be "purposeful" availment, meaning that there must be an ***intent*** or ***conscious*** recognition of the consequences of a person's actions. This element of scienter is simply not present in this case. M.Y.J.P. is a poor, unsophisticated Haitian woman, unable to speak English, lacking in schooling or other vocational ability and forced to communicate solely through translated letters and an occasional telephone call through an interpreter. There can be no doubt that she is woefully unequipped to deal with the intricacies of a bureaucracy such as DYFS, much less a complicated legal system in a foreign country. *See, e.g., In re Interest of Doe*, 926 P.2d at 1298 ("[the Department of Human Services] has forced a citizen of the Philippines to come to a foreign country and wage an ongoing battle in an unfamiliar court system to avoid permanently losing her child. The international context of this case leans strongly in favor of [that foreign citizen]."). To suggest that M.Y.J.P. knew that by responding to a limited number of letters and one telephone call from DYFS, her parental rights would thereby be subject to termination is counterintuitive and completely inconsistent with the facts. Taking the position of the courts below to its logical conclusion, M.Y.J.P. could

arguably have prevented New Jersey's assertion of jurisdiction over her simply by ignoring the communications of DYFS and saying nothing at all.

Finally, it must be noted that from 1995 to the present, M.Y.J.P. has consistently expressed a desire to be reunited with S.J.A., whether in Haiti or in the United States. However, DYFS's admitted refusal to return the child to Haiti under any circumstances and the failure of DYFS to even consider assisting M.Y.J.P. to come to the United States,[6] have made it impossible for M.Y.J.P. to fulfill her parental responsibilities.

III. THE COURTS BELOW ERRED IN RULING THAT THE PROCEDURES UTILIZED BY THE TRIAL COURT AT TRIAL COMPORTED WITH FUNDAMENTAL CONSTITUTIONAL REQUIREMENTS OF PROCEDURAL DUE PROCESS.

The United States Constitution provides that no State shall "deprive any person of life, liberty or property, without due process of law." *U.S. Const., amend. XIV, § 1.* Further, entitlement to procedural due process is not contingent upon United States citizenship. *See Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976). As both the United States Supreme Court and the New Jersey Supreme Court have held, due process requires adequate notice and a fair

[6] The only attempts by any New Jersey officials to assist M.Y.J.P. to come to the United States occurred well after the termination proceedings had been initiated, and were for the sole purpose of allowing her to appear personally at trial. In fact, DYFS did not assist in this endeavor at all, and, as previously noted, it was the Administrative Office of the Courts which actually made this inquiry.

opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1984) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *Doe v. Poritz*, 142 N.J. 1, 99 (1995) ("Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner.").

In fashioning the due process elements of a hearing, consideration must be given to the following factors:

> First, the private interest that will be affected by the official action; second, the risk of any erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Unquestionably, the private interest in this case (i.e., M.Y.J.P.'s right to parent her child) is a fundamental liberty interest, commanding the greatest degree of Constitutional protection. *See Santosky,* 455 U.S. at 753-54; *Lassiter*, 452 U.S. at 27.

Courts have recognized that the risk of deprivation of a defendant's rights is great when the defendant is not able to be present or participate in a meaningful manner at trial. The requirement that the defendant be given an opportunity to be heard "at a meaningful time and in a meaningful manner" means that he or she be given "an

effective opportunity to defend by confronting any adverse witnesses *and by presenting his own arguments and evidence orally.*" *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (emphasis added).[7] *See also In the Matter of Allegations of Sexual Abuse at East Park High School*, 314 N.J. Super. 149, 166 (App. Div. 1998) (holding that when matters of fact are at issue in a state action affecting a fundamental right, the defendant "*must be afforded an opportunity to be present*, to adduce evidence, to be represented by counsel, to confront witnesses against her and to receive a written opinion.") (emphasis added). In *East Park High School*, the right at stake was the defendant's reputation and whether DYFS's procedures met the procedural due process standards. *See id.* at 160-64. The court held that the submission of a sworn statement in lieu of testimony was not sufficient to satisfy due process.

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[7] Even in civil cases, "the right of a party to be present at each stage of a lawsuit [is] virtually sacrosanct . . . . " *Ferrigno v. Yoder*, 495 So. 2d 886, 888 (Fla. Dist. Ct. App. 1986), *rev. denied*, 504 So. 2d 768 (Fla. 1987); *see also Lane v. Tennessee*, 315 F.3d 680, 682 (6th Cir.) ("Parties in civil litigation have an analogous due process right to be present in the courtroom and to meaningfully participate in the process . . . . "), *cert. granted*, 123 S. Ct. 2622 (2003); *Michigan Dep't of Soc. Servs. v. Render*, 377 N.W.2d 421, 423 (Mich. Ct. App. 1985) ("Even in ordinary civil actions, each party is entitled to be present in the courtroom 'at all stages during the actual trial of the action' ") (citations omitted); *Silverman v. General Motors Corp.*, 425 N.E.2d 1099, 1106 (Ill. Ct. App. 1981) ("a defendant has the right to be present at the trial of his case, whether civil or criminal . . . . "); *Carlisle v. County of Nassau*, 64 A.D.2d 15, 18 (N.Y. App. Div.) ("A party to a civil action not in default is entitled to be present in the courtroom and be represented by counsel at all stages during the actual trial of the action."), *app. dismissed*, 45 N.Y.2d 965 (1978); *Whaley v. State*, 82 So. 2d 187, 190 (Ala. 1955) (noting that a civil litigant is entitled to be present in the courtroom for the entire trial).

See id. at 166. Moreover, as the Appellate Division conceded in this very case, "[i]t is well established as a matter of due process principle that procedural requirements are more demanding in parental termination cases than in ordinary civil actions, including other types of cases dealing with parental rights." App. at 47.

Courts in other jurisdictions have recognized that procedural due process warrants heightened procedures in proceedings affecting a defendant's parental rights. *See, e.g., In the Matter of S.M. and A.D.M.*, 738 P.2d 883, 884-85 (Kan. Ct. App. 1987) (holding that an in-state prisoner has the right to be physically present at a parental rights trial); *Adoption of Edmund*, 739 N.E.2d 274, 277 (Mass. App. Ct. 2000) (vacating trial court termination of parental rights decree because defendant was not afforded opportunity to participate by phone); *State of New Mexico ex rel. Children, Youth and Families Dept. v. In the Matter of Ruth Ann E. Sonya Sue E. and Blanca Alicia E.*, 974 P.2d 164, 171 (N.M. Ct. App. 1999) (reversing trial court for failure to provide defendant with either a continuance, telephonic connection to hearing or other appropriate method for meaningful participation in the hearing); *In the Matter of Kendra M.*, 572 N.Y.S.2d 583, 585 (N.Y. Sup. Ct. App. Div. 1991) (reversing trial court's decision to proceed without defendant who was in jail). Thus, even before proceeding to trial, a court must ensure that minimal due process requirements are met; if due process protections cannot be provided to a defendant, the case against the defendant must be dismissed.

While DYFS has an interest in "preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings," these interests do not come close to

outweighing the liberty interest of the parent. *Santosky*, 455 U.S. at 766; *Lassiter*, 452 U.S. at 27 ("though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those" involved in a termination of parental rights matter). Indeed, as this Court held in *Addington v. Texas*, 441 U.S. 418, 427 (1979), "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.").

Distilled to its essence, the Appellate Division opinion held that the trial court met its obligation of ensuring due process by making "efforts to arrange for M.Y.J.P. either to attend the trial or to participate telephonically . . . . " App. at 43. The court, however, attached no significance to the fact that the trial court failed in these efforts. In particular, the trial court was not able even to abide by the terms of its own March 13, 2001 order, ruling that: (1) M.Y.J.P. be allowed to participate in the trial via telephone and translator; (2) that M.Y.J.P. be permitted to request brief adjournments to confer with her counsel; and (3) all witnesses and counsel be cognizant of and cooperate with the translator so as to ensure that M.Y.J.P. received an accurate translation of the trial.

The inability of M.Y.J.P. to meaningfully participate in the trial had a devastating impact upon her defense. Because the right at stake in *East Park High School* (reputation) pales in comparison to the fundamental right to parent a child, at a minimum, M.Y.J.P. should have been allowed to participate in the trial via telephonic conference or some other mechanism equally protective of her due process rights. Because M.Y.J.P. was not physically present in the courtroom and sitting next to counsel,

and because M.Y.J.P. was not afforded the opportunity to confer with counsel in private during the course of the trial, her attorneys could not effectively cross-examine witnesses, which is clearly one of the key elements of due process. *See Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969) ("the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process."). The remedy fashioned by the trial court – that of allowing trial transcripts to be translated and sent to Haiti and then allowing witnesses to be recalled by M.Y.J.P.'s attorneys – was not remotely the equivalent of having M.Y.J.P. participate in the trial, whether personally or telephonically.

Though the trial court ultimately was not able to provide the procedural due process safeguards that it had previously deemed necessary, it does not follow that these failed efforts absolved the trial court of the obligation of ensuring that M.Y.J.P.'s procedural due process rights were safeguarded. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) ("a mere gesture is not due process."). Based upon these facts, the case against M.Y.J.P. should have been dismissed before the trial even commenced.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted.

MARTY A. JUDGE, ESQ.
Counsel of Record
MARK P. LUEDEKE, ESQ.
DRINKER BIDDLE & REATH LLP
105 College Road East
Suite 300
Princeton, New Jersey 08542
(609) 716-6500

December 15, 2003

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3402-01T4
A-3875-01T4

DIVISION OF YOUTH AND FAMILY SERVICES,

Plaintiff-Respondent,

v.

M.Y.J.P. AND J.R.A.,

Defendants-Appellants.

IN THE MATTER OF THE GUARDIANSHIP OF S.J.A.

Argued: October 17, 2002 – Decided: May 27, 2003

(Filed May 27, 2003)

Before Judges Kestin, Eichen and Fall.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County, FG-11-41-98.

William J. Sweeney, Designated Counsel, argued the cause for appellant J.R.A. in 3402-01 (Yvonne Smith Segars, Public Defender, attorney; Mr. Sweeney, on the brief).

Marty M. Judge argued the cause for appellant M.Y.J.P. in 3875-01 (Drinker Biddle & Shanley, attorneys; Mr. Judge, of counsel; Mark P. Luedeke, on the brief).

Mary Jane Lembo Cullen, Deputy Attorney General, argued the cause for respondent (Peter C.

Harvey, Acting Attorney General, attorney; Michael J. Haas, Assistant Attorney General, of counsel; Ms. Cullen, on the brief).

The opinion of the court was delivered by

KESTIN, P.J.A.D.

M.Y.J.P. and J.R.A. are, respectively, the biological mother and father of S.J.A. They have appealed separately from a judgment terminating the parental rights of each and granting guardianship of S.J.A. to the Division of Youth and Family Services (DYFS or the Division). The appeals have been consolidated. The trial court's decisional rationale was expressed by Judge Council orally on February 1, 2002 and in a detailed written opinion filed on that date.

The child's mother, M.Y.J.P., is a Haitian citizen residing in Haiti. The father, J.R.A., is a Haitian citizen who, when the operative facts occurred and at the time of trial, resided in New Jersey. M.Y.J.P. argues the trial court erred in rejecting her motion to dismiss the complaint as to her for lack of *in personam* jurisdiction, in violating her procedural due process rights, and in denying her a fair trial. She also argues that the trial court erred in admitting into evidence the testimony of DYFS's bonding expert. M.Y.J.P. and J.R.A. both argue that the trial court erred in terminating their parental rights because the Division did not prove each of the four required elements of *N.J.S.A.* 30:4C-15.1a; *see also Division of Youth and Family Servs. v. A.W.*, 103 *N.J.* 591, 604-11 (1986), as to each of them.

I

When the child, S.J.A., was born on August 5, 1992, his mother, M.Y.J.P., was twenty years of age and his father, J.R.A. was twenty-eight. The parents had begun dating in 1990, when M.Y.J.P. was a student at a school in Port-au-Prince, in which J.R.A. was employed as a teacher. In November 1991, M.Y.J.P. became pregnant and returned to her father's home in the province of L'Acul du Nord. J.R.A. remained in Port-au-Prince, where he married W.A. M.Y.J.P. testified during a *de bene esse* deposition that her father and siblings assisted her in the care of S.J.A., and thus, despite a United States embargo related to the civil unrest in Haiti at the time, the child was never without food and clothing. J.R.A. did not visit or maintain any contact with S.J.A. while the child was in L'Acul du Nord.

In May 1994, at J.R.A.'s request, M.Y.J.P. and S.J.A. returned to Port-au-Prince where they resided with M.Y.J.P.'s aunt. M.Y.J.P. testified that, at the time, conditions in Port-au-Prince were dangerous and violent; that she was often afraid; and that she had problems obtaining sufficient food for S.J.A. Around that time, J.R.A. asked M.Y.J.P. whether she would allow S.J.A. to go to the United States with him and S.J.A.'s half-brother J.R.A., Jr. M.Y.J.P., who by then had learned of J.R.A.'s marriage, agreed, but insisted that J.R.A. send for her as soon as possible, which he said he would do. M.Y.J.P. testified that she would not have allowed S.J.A. to leave Haiti if she had known that J.R.A. would not send for her.

The child arrived in the United States in July 1994 with his father, J.R.A., accompanied by the father's wife, W.A., and J.R.A.'s other child, J.R.A., Jr., who was about

four years older than S.J.A. Their entry was sponsored by the Lutheran Ministries Haitian Refugee Program (Lutheran Ministries), and they settled in New Jersey. J.R.A. did not send for M.Y.J.P.; and W.A. left J.R.A. shortly after their arrival, leaving J.R.A. as the primary caretaker of the children.

DYFS first became involved with the family on October 20, 1994, when it received a referral from Lutheran Ministries that J.R.A. had left the children home without adult supervision. Lutheran Ministries assisted J.R.A. in arranging for child care. Thereafter, on November 16, 1994, DYFS received a second referral, from the principal at J.R.A., Jr.'s school, reporting that the child had a red and swollen left ear. DYFS sent J.R.A., Jr., to a hospital for examination. The examination disclosed that J.R.A., Jr. had old scars on his chest, back, and arms. J.R.A. admitted he had used corporal punishment, and refused to stop doing so because he maintained that such punishment was acceptable in Haiti. A DYFS case manager noted at the time that "[w]hen the children are in [J.R.A.'s] presence, neither child smiles or talks and they both display fear of him and their affects are flat."

At that point, DYFS recommended placing J.R.A., Jr. in a foster home, to which J.R.A. agreed, stating, according to DYFS personnel, that if the Division did not accept J.R.A., Jr., who had been having behavioral problems at home and at school, he would abandon the child. J.R.A. also insisted that DYFS place the children in the same foster home because he said they had a close relationship and separation would have an adverse effect on S.J.A. J.R.A. then signed a voluntary placement agreement, written in English, and the children were placed in foster

care. J.R.A. testified to his understanding that he could retake custody of S.J.A. "[a]nytime."

II

This matter commenced on June 4, 1998, with DYFS's complaint for guardianship of S.J.A., then almost six years of age, and his ten-year-old half-sibling, J.R.A., Jr.[1] On June 18, 1998, DYFS mailed a summons and copy of the complaint, written in English, to M.Y.J.P. in Haiti. M.Y.J.P. is fluent only in Creole. In the accompanying cover letter, DYFS advised M.Y.J.P. that if she could not afford an attorney one would be appointed at no cost, cautioned her that if she did not appear in court her parental rights would be terminated, and informed her that a hearing would be held on September 24, 1998.

By letter handwritten in English, dated June 26, 1998, M.Y.J.P. responded[2] that she had read the documents "carefully" and appreciated the fact that DYFS was "interested in [S.J.A.'s] parental rights and his future too." She requested that an attorney be appointed on her behalf and asked for a photograph of her son.

On September 24, 1998, the trial court conducted a case management conference and directed DYFS to provide M.Y.J.P. with notice of the next court date. On October 5, 1998, DYFS mailed a second summons and

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[1] Issues regarding J.R.A., Jr. are not involved in this appeal. His biological mother is I.C.

[2] Given M.Y.J.P.'s lack of English fluency, it has been assumed throughout that this letter and subsequent correspondence from her in English were written on her behalf at her behest.

complaint written in English to M.Y.J.P. The accompanying cover letter stated that a hearing had been set for October 22, 1998. M.Y.J.P. responded by letter dated October 19, 1998, once again asking DYFS to appoint an attorney for her because she was a "moneyless person." She indicated that she had not received the October 5 letter until October 14, and that she had read the documents carefully as I am told.

* * *

> I appreciate a lot for the decision you want to make to determinate my child parental rights. So I must tell you sincerely I feel a little bit sad because I am not able to attend the hearing. And I know a hearing is never held by one part or one person . . . [so] could you help me in order to attend the hearing. [sic]

In orders entered on October 22, 1998, and December 9, 1998, the trial court appointed counsel for the respective parents and designated the guardian *ad litem.* On November 13, 1998, the court, following on another case management conference, ordered, *inter alia,* psychological and bonding evaluations of J.R.A., the two children, and the foster parents of the children at DYFS's instance. The order also provided for the retention of experts to perform evaluations on behalf of "the defendant," if requested. All evaluations were to be completed by January 1, 1999.

In January 1999, counsel for M.Y.J.P. raised the issue of personal jurisdiction. By order entered on January 28, 1999, the court directed DYFS to pay for a translator to assist defense counsel in communicating with M.Y.J.P. and directed DYFS to seek assistance from the American Embassy in Haiti in communicating with M.Y.J.P. The court reserved decision on the issue of jurisdiction.

After another case management conference, the court, on March 30, 1999, ordered that the petition regarding J.R.A., Jr. be accelerated while consideration of the jurisdictional argument in S.J.A.'s case pended. In June 1999, M.Y.J.P. filed a motion to dismiss the complaint as to her for lack of jurisdiction over the person.

On August 5 and 11, 1999, the court tried the guardianship petition regarding J.R.A., Jr. The father, J.R.A., who had been incarcerated in the Mercer County Correctional Facility, appeared by writ on August 5, but did not appear on August 11, 1999, after he had been released. At the conclusion of the trial, the court terminated J.R.A.'s and I.C.'s[3] parental rights to J.R.A., Jr., and a judgment of guardianship was entered on August 25, 1999. No appeal from that judgment was filed.

In a letter dated June 22, 2000, the trial court judge sent counsel for M.Y.J.P. and the Division a written decision denying M.Y.J.P.'s motion to dismiss the guardianship complaint for lack of *in personam* jurisdiction to the extent it sought termination of her parental rights as to S.J.A. The Court determined that New Jersey had a *parens patriae* interest in the best interests of the child. This determination was based on findings that the child, born in Haiti on August 5, 1992, had come to the United States with M.Y.J.P.'s permission and in the care and custody of J.R.A., then accompanied by his wife, W.A.; that, in 1994, J.R.A. placed the child and his half-sibling into foster care in this State; and that J.R.A. was incarcerated in 1994

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[3] Apparently, I.C., made no appearance in the J.R.A., Jr. guardianship matter.

"and has had little or no contact with either child during the past six years." The court found further that M.Y.J.P.

> has not seen her child or had any contact with him since he left Haiti. She has never visited the United States and the child has never visited Haiti. She speaks very little English, and the child does not speak Creole. More important, M.Y.J.P. has no plans for the child's future, and does not wish to have the child returned to Haiti.

The court also determined that DYFS had given M.Y.J.P. sufficient notice of the guardianship complaint and that M.Y.J.P. had sufficient "minimum contacts" with the State of New Jersey – namely, her receipt of services by DYFS in caring for S.J.A. – so as not to offend "traditional notions of fair play and substantial justice."

At counsel's request, the court delayed issuance of an order to allow counsel time to discuss with M.Y.J.P. the filing of an interlocutory appeal. The court ultimately entered an order on September 12, 2000.

On October 2, 2000, M.Y.J.P. filed a motion for leave to appeal, for summary disposition, and for a stay. We denied the motion. Thereafter, on November 22, 2000, M.Y.J.P. filed a notice of motion with the New Jersey Supreme Court for leave to appeal and for a stay pending final disposition. The Court denied that application, with two justices dissenting.

In ensuing case management conferences, the trial court mandated bonding evaluations of M.Y.J.P., S.J.A., and the foster parent, and ordered defense counsel to "attempt to arrange for M.Y.J.P. to travel to New Jersey for the purpose of trial[.]" The court recognized, however, that M.Y.J.P. might be unable to obtain a visa to enter the

United States, and therefore also ordered the parties to "prepare to proceed with her testimony by phone."

On March 13, 2001, ruling on a short notice motion filed on behalf of M.Y.J.P., the court entered an order establishing trial procedures. The order provided, *inter alia,* that M.Y.J.P. "shall appear at trial by telephone." The arrangements were to be made by the Administrative Office of the Courts. The order also provided that, if telephone participation were not possible

> alternative procedures shall be adopted before the trial commences to satisfy minimal due process standards; and
>
> Upon notice by counsel to the Court, [M.Y.J.P.] may request a brief adjournment of the trial at the end of each witness's testimony (or sooner, if necessary to raise or meet an objection) to confer with her counsel privately; and
>
> All witnesses shall be instructed that [M.Y.J.P.] is participating at trial by telephone and with the aid of a translator and that during testimony the witness shall be cognizant of and cooperate with the translator[.]

The order concluded with the following provision, sought by M.Y.J.P. and unobjected to by DYFS:

> No testimony or other proofs adverse to [M.Y.J.P.] may be proffered at trial by any party regarding [M.Y.J.P.]'s fitness as a parent and her relationship to her son.

In advance of a March 30, 2001 case management conference, the Mercer County trial court administrator advised the judge in a memorandum that he had not been successful in obtaining a temporary visa for M.Y.J.P. to

allow her to be present at trial, and that Haiti lacked the telephonic or technical capabilities to enable M.Y.J.P. to participate in the trial by telephone. Accordingly, the court acknowledged that further, specially tailored procedural safeguards needed to be formulated for the trial to proceed in the likely absence of M.Y.J.P.

As a result, on May 30, 2001, DYFS filed a motion seeking to set a trial date, to proceed in the absence of M.Y.J.P., and to implement alternative procedural safeguards to address M.Y.J.P.'s inability to participate personally in the trial. In response, on May 31, 2001, M.Y.J.P. filed a motion, on short notice, for dismissal of the guardianship action "because of the impossibility of providing trial procedures that satisfy procedural due process under the United States and New Jersey Constitutions," or, in the alternative, for implementation of long-term foster care for S.J.A.

After oral argument on the motion on July 13, 2001, the judge found that "the welfare of the child outweighs [M.Y.J.P.'s] interest . . . [in] physically being present for trial" and that the court could proceed in M.Y.J.P.'s absence "provided that we have procedural safeguards in place." By order entered on July 16, 2001, the court set forth the following trial procedures:

> 1) The Division shall present its case-in-chief.
>
> 2) Defendants [M.Y.J.P. and J.R.A.] shall be permitted to cross-examine the Division's witnesses.
>
> 3) A transcript of (1) and (2) shall be prepared.

4) The transcript shall be translated from English to Creole.[4]

5) A recess shall be had and [M.Y.J.P.'s] counsel shall have the opportunity to review the transcript with their client.

6) Counsel for [M.Y.J.P.] shall be permitted to call back the Division's witness(es) for cross-examination of issue(s) that are raised in consultation with [M.Y.J.P.].

7) [J.R.A.] (Birth Father) shall be permitted to testify.

8) [M.Y.J.P.] shall be permitted to testify through one of the following methods:

> a) Defense counsel shall be permitted to arrange a telephone deposition of their client; or

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[4] Because of the prohibitive cost of written translations, the court subsequently, on August 20, 2001, modified the order to provide for the presence of a Creole translator in the courtroom during trial to translate and record the testimony on a tape recorder. Provision was made for sending the tapes to M.Y.J.P. for review and consultation with counsel. The August 20 order also provided that M.Y.J.P.'s

> counsel shall, at their election, either retain the services of a Haitian attorney to assist with an audio-visual deposition of [M.Y.J.P.] or conduct [her] telephone deposition. . . . In reference to said deposition, the Division's counsel shall be permitted to listen to said deposition at the time it is being conducted and to cross-examine [M.Y.J.P.] if necessary[.]

The August 20 order also prohibited communication among the Division's witnesses between examination and cross-examination.

> b) Defense Counsel shall be permitted to retain counsel in Haiti to conduct a deposition of [M.Y.J.P.]; or
>
> c) Defense Counsel shall be permitted to travel to Haiti to conduct a video deposition of [M.Y.J.P.].

Counsel for M.Y.J.P. ultimately arranged for her videotaped *de bene esse* deposition.

Shortly before the scheduled date of trial, M.Y.J.P. moved for an order excluding the testimony of the Division's bonding expert, Wendy Matthews, Ph.D., on the grounds that exclusion was necessary "to create a level playing field[;]" that Dr. Matthews had not evaluated the bond between M.Y.J.P. and S.J.A., and that Dr. Matthews lacked any factual predicate upon which to opine relative to the bonding, *vel non,* between M.Y.J.P. and S.J.A. The trial court denied that motion on August 6, 2001.

Two days of trial were held on August 6 and 7. The proceedings were then recessed so that the Creole version of the testimony could be sent to M.Y.J.P., and to allow for M.Y.J.P.'s video *de bene esse* testimony, which was conducted on August 30, 2001. The trial resumed on September 10, 11, and 12, 2001. Closing arguments were heard on December 3, 2001. For reasons summarized orally on February 1, 2002 and stated comprehensively in a written decision of the same date which embodied extensive findings of fact and conclusions of law, the court terminated the parental rights of M.Y.J.P. and J.R.A., placing S.J.A. in the guardianship of DYFS. On February 20, 2002, the court entered a final judgment of guardianship memorializing its determinations.

III

The evidence at trial produced a coherent story regarding DYFS's involvement with the parents and the child, and each parent's involvement with the agency and the child. However, each party furnished somewhat different perspectives on the background facts, relational issues, and procedural events.

A.

The testimony and documents presented by the agency related that in December 1994, shortly after DYFS became involved in the matter, J.R.A. informed the agency that M.Y.J.P. resided in Haiti and gave an address for her. On March 6, 1995, following attempts to verify the address with an international social services agency, the caseworker assigned to the matter sent a letter, written in Creole, to M.Y.J.P. On March 23, 1995, M.Y.J.P. placed a collect telephone call to DYFS. However, DYFS did not have a Creole translator in the office at that time, so arrangements were made through the international operator for personnel of the Division to call M.Y.J.P. on April 10, 1995. Meanwhile, by letter written in Creole dated March 27, 1995, M.Y.J.P. thanked DYFS and advised the Division to keep S.J.A. "where he is" because she was still in school.

On April 10, 1995, the caseworker spoke to M.Y.J.P. by telephone, through an interpreter. M.Y.J.P. admitted that she had given J.R.A. permission to take S.J.A. to the United States "for a better life." The caseworker explained that S.J.A. was in foster care and that DYFS was required to develop a permanent plan for the child. In her *de bene esse* deposition testimony, M.Y.J.P. maintained that the

caseworker did not explain what a "permanent plan" meant, although she said she felt comforted by the caseworker's representations that S.J.A. was "fine" and "secure." According to the caseworker, in the April 10, 1995 telephone conversation, M.Y.J.P. requested that the agency return S.J.A. to Haiti; however, before the transfer process could be discussed, M.Y.J.P. withdrew the request and said that S.J.A. should remain in New Jersey where he would have a "better life." M.Y.J.P. testified, however, that she had never asked for S.J.A.'s return to Haiti, and conceded that she would not have agreed to S.J.A.'s return even if DYFS had promised to send her $100 a month for food and clothing, which they did not do. She testified: "They did not ask me that, and I would not have agreed for them to send him back. I would have preferred for him to stay over there." She also stated in her deposition: "I don't agree for my parental rights to be terminated."

M.Y.J.P. admitted that she had relatives in the United States, but refused to provide their addresses because she preferred to contact them herself. During the telephone conversation, M.Y.J.P. "pleaded" with the caseworker to assist her in obtaining a visa to come to the United States so that she could care for S.J.A. At the conclusion of the conversation, the caseworker told M.Y.J.P. to call her any time through DYFS's toll free number and discussed sending photographs of S.J.A.

The Division had no further telephone communication with M.Y.J.P., although she represented that she had attempted to call DYFS but was unable to complete the call due to the language barrier. The caseworker testified that she did not contact the Department of State, an immigration attorney, or Lutheran Ministries, because she did not believe it was DYFS's role to bring somebody from

a country where there was a civil war to the State of New Jersey to parent their child. Nor did she arrange for S.J.A. to visit M.Y.J.P. in Haiti, because "neither [J.R.A.] nor [M.Y.J.P.] nor any of the other relatives indicated any desire to have that child returned for any reason to Haiti."

Thus, DYFS began to focus on attempting to reunite S.J.A. with J.R.A. because, according to the caseworker, he

> would have been considered the custodial parent and he was certainly the parent that we were primarily working with. I think what drove a lot of this case['s] decisions was the fact that [M.Y.J.P.] said leave the child there, do not send him back to Haiti. And it was my understanding that there was not much the Division could do, if anything, . . . to bring her here. So, therefore, working with [M.Y.J.P.] was pretty limited.

On her part, M.Y.J.P. failed to maintain contact with DYFS or the child from April 1995 to April 1998.

By letter written in Creole, dated February 24, 1997, DYFS advised M.Y.J.P. that because S.J.A. had been in foster care for more than two years, and because returning him to J.R.A. was "not possible," S.J.A.'s case would be referred to the Adoption Resource Center (ARC) for adoption.

By letter dated March 16, 1998, DYFS informed M.Y.J.P. that a petition for guardianship of S.J.A. was being prepared for filing, so that the child might be placed for adoption. In response, by letter dated April 15, 1998, M.Y.J.P. stated that although she did not have a "new plan," she was "waiting for the notice of the court hearing." M.Y.J.P. also requested photographs of her son, which were not sent at that time.

In April 1999, while the guardianship suit was pending, DYFS inquired with an international social services agency whether a study of M.Y.J.P.'s home in Haiti could be conducted. After learning that a home study might take three to five years to complete, DYFS determined that the child would not be permitted to return to Haiti.

In February 2000, at counsel's request, M.Y.J.P. spoke through an interpreter over the phone to S.J.A., who does not speak Creole. DYFS also mailed photographs of the child to M.Y.J.P. In April 2001, S.J.A. told the then-assigned caseworker that he did not remember M.Y.J.P. In 2001, M.Y.J.P. applied for a visa to the United States, but her request was denied.

During her *de bene esse* deposition, M.Y.J.P. testified to her conflicting plans for S.J.A. On the one hand, she noted her desire to have the child reunited with her in Haiti; on another, she indicated a wish merely to have the child visit with her in Haiti, and that she was agreeable to the child remaining in New Jersey but disagreed with the proposal that her parental rights be terminated.

A DYFS supervisor testified at trial that DYFS did not have a policy to assist parents in foreign countries to come to the United States. She explained that the Immigration and Naturalization Service (INS) was "very strict on their rules, on what was their province." Nevertheless, that witness conceded that in some cases DYFS had returned children to a foreign country upon receipt of a positive home study and where the parent or relative wanted the child returned.

B.

According to DYFS's records, J.R.A. had his first supervised visit with S.J.A. on December 9, 1994, approximately three weeks after foster care placement began. A second visit occurred on February 25, 1995. J.R.A. maintained at trial, however, that the caseworker assigned at the time failed to make any arrangements for visitation, and that he had had only one visit in the first three months of placement. J.R.A. also asserted that, on January 2, 1995, he had requested S.J.A.'s return, but the caseworker refused. The succeeding caseworker testified, conceding that a parent can revoke a voluntary placement agreement at any time, and that if DYFS wishes to keep a child in its care, it must petition the court within five days. However, the caseworker testified that there was no indication in DYFS's records that J.R.A. had revoked the agreement.

On March 2, 1995, the caseworker met with J.R.A. and an interpreter from Lutheran Ministries to obtain a history of the family and "to make certain that [J.R.A.] understood . . . why his children were in foster care and how the Division planned to move forward." J.R.A. provided some family history and admitted that he had not lived with S.J.A. prior to entering the United States. J.R.A. also asked for assistance in bringing M.Y.J.P. to the United States to care for S.J.A. but, according to J.R.A., the caseworker replied that DYFS could not do so. The caseworker then discussed available services with J.R.A. and advised him as to what would be expected in order for the children to be returned, including completing a

substance and psychological evaluation, engaging in counseling, maintaining employment, and providing a safe and stable home.[5] Thereafter, from March 1995 through June 1995, J.R.A. was offered supervised bi-weekly visits with the children. According to the Division's records, he visited S.J.A. on six occasions during that period.

Meanwhile, an evaluation dated April 17, 1995, by a psychiatrist, Dr. Carlo J. Baril, reported a conclusion that J.R.A. did not need "psychiatric treatment, because there is no evidence of psychopathology." Baril noted that J.R.A.'s use of corporal punishment was very common in Haiti, where it was not viewed as child abuse. Nonetheless, Baril indicated that J.R.A. agreed to discontinue such punishment. Baril also found that J.R.A. "comes across as a very concerned and loving parent," and thus he recommended "that the children be returned to [J.R.A.] as soon as all of the evaluations are completed and that he be placed under ongoing supervision by DYFS for a period of time."

On May 18 and June 2, 1995, J.R.A. tested positive for cocaine use; and he was found to have tampered with a test on June 28, 1995. J.R.A. testified, however, that he did not start using drugs until July 1995; nevertheless, the caseworker referred J.R.A. to a drug counseling program on June 28, 1995. J.R.A. was eventually terminated from the program for noncompliance. Arrangements had also

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[5] There is no support in the record for J.R.A.'s assertion that the Child Placement Review Board, in mid-March expressed its concern that DYFS was not acting in the child's best interests, *i.e.*, toward reunification.

been made for him to participate in psychological counseling with a Creole-speaking therapist; however, J.R.A. was terminated from that program, too, for noncompliance.

On June 23, 1995, DYFS sent letters to four paternal relatives whom J.R.A. had identified as possible caregivers. DYFS received only one response, from relatives in Port-au-Prince, who asked for assistance in coming to New Jersey to care for the children, and if that was not possible, asking DYFS to "keep them for us while they are small and send their pictures for us." DYFS took no further action regarding placement with these relatives because it could not facilitate their entry into the United States.

In July 1995, J.R.A. pled guilty to possession of a controlled dangerous substance (CDS). From July 1995 to December 1996, he was again offered bi-weekly visitation. According to the Division's records, he saw S.J.A. fourteen times during that period.

On October 18, 1995, the court entered an order directing that S.J.A. continue in placement for six months, with a goal of reunification with J.R.A. Almost a year-and-a-half later, DYFS notified J.R.A., by letter dated March 3, 1997, that it was transferring the case to ARC.

On September 10, 1997, J.R.A. was arrested and later pled guilty to possession of CDS and criminal mischief for which he was incarcerated. Meanwhile, on December 10, 1997, J.R.A. entered into a "Service Agreement/Application" with DYFS, in which he agreed, *inter alia,* to contact the Heartland Clinic for drug counseling.

J.R.A. visited S.J.A. only a few times in 1997 and not at all in 1998. He was incarcerated for part of that time

and again in 1999. During that period, he was convicted of one theft charge and acquitted of another, separate, theft charge. On March 11, 1998, J.R.A. advised the caseworker that he did not have time to attend a counseling program and believed "it was better for him to maintain a job."

In January 1999, J.R.A. had contact with S.J.A. during a bonding evaluation. On March 30, 1999, J.R.A., who was incarcerated at that time, filed a motion seeking supervised visitation with both children. The court denied that application by order entered on May 21, 1999.

On August 11, 1999, in terminating J.R.A.'s parental rights to J.R.A., Jr., the court found, *inter alia,* that J.R.A. had left the child unattended, had voluntarily placed the child in foster care, had abused drugs, had failed to visit with the child, had failed to maintain employment, had failed to procure an apartment, and had engaged in physical and emotional abuse of the child. The court also found that DYFS had done everything possible to reunite J.R.A. with his son, but that J.R.A. had attended parenting classes and drug testing only sporadically, revealing an "overall picture" of an individual who was "both unwilling and unable to eliminate doing what he was doing, which would affect his care for [his] child."

On August 17, 1999, a caseworker spoke to another paternal relative who resided in the United States. That relative indicated that she had no interest in assuming custody of S.J.A. On February 8, 2000, J.R.A. told the caseworker he was unemployed and was living with friends.

Beginning shortly thereafter, J.R.A. was arrested on several occasions for shoplifting. During the year 2000 and into 2001, J.R.A. had no contact with DYFS or S.J.A.

On February 8, 2001, one of the caseworkers spoke to J.R.A. who advised her that he had just been released from jail. When questioned as to whether he was attending Narcotics Anonymous meetings, J.R.A. replied that the meetings were "a waste of time" and that he was planning to get off drugs on his own.

When J.R.A. testified at the trial in this matter, he was incarcerated. He stated that he was to be released shortly. He planned, upon his release, to return to the "room" at 15 Chambers Street in Trenton where, he said, he had resided since 1998 when not incarcerated.

In opposing termination of his parental rights, J.R.A. proposed three choices instead: first, that M.Y.J.P. be permitted to come to the United States to raise the child; second, that S.J.A. remain in long-term foster care; and third, that the child be repatriated to Haiti. On January 31, 2002, following trial but before the date of decision, INS advised the court that J.R.A. had been sent to a Louisiana federal prison to await deportation to Haiti.

C.

On March 9, 2001, John Liccardo, M.D., conducted a psychiatric evaluation of J.R.A. and a bonding re-evaluation of J.R.A. and S.J.A. to assist DYFS in determining whether S.J.A. should be adopted or returned to J.R.A. In respect of the psychiatric evaluation, Liccardo concluded that J.R.A. showed no evidence of a major psychiatric illness, but "has a mixed personality disorder with prominent inadequate, antisocial and dependent traits." At trial, Liccardo defined a personality disorder as "an ingrained way of behaving." He explained that J.R.A. tended to project responsibility for his behavior onto

others, and that J.R.A. had "inadequate traits" in that he was "unable to provide for himself or for his children" because he was "not secure enough to be able to cope with the stresses of working, trying to raise a family, [and] trying to meet financial obligations."

Liccardo opined that, in order to manage a personality disorder, an individual would need long-term supportive insight counseling or psychotherapy, and would need to be motivated to change. He concluded that J.R.A. was not motivated to change and had demonstrated an inability to "improve his lifestyle."

With regard to J.R.A.'s parenting ability, Liccardo evaluated J.R.A. to be incapable of meeting S.J.A.'s emotional needs. Liccardo explained that during the bonding session, J.R.A. was so "absorbed with himself and his feelings that he wanted to be reassured that [S.J.A.] hadn't forgotten him, . . . loved him, . . . [and] wanted to be with him," and he failed to show any "empathy as to what the children felt." Thus, S.J.A. "sensed that he's supposed to do something to make things better for [J.R.A.]." Liccardo explained that placing a child in the parental role creates feelings of inadequacy and guilt because children are not capable of performing such a role, and therefore it is "totally destructive for their emotional growth."

With regard to bonding, Liccardo found that S.J.A. was "not enthusiastic about being with [J.R.A.]" and he concluded that, at best, S.J.A. had an insecure, ambivalent bond attachment to J.R.A. Liccardo opined that if you disrupt an insecure, ambivalent bond, the child "can transfer the love and affection [he or she] needs to the [adoptive or foster family]." Liccardo explained further that a negative

aspect of such a bond is that the child believes that "whatever happens, it's [his] fault."

In contrast, Liccardo stated that S.J.A. was "very positive about his experiences with the foster family" and when questioned as to how he would feel if the court determined that he would have to remain with them, S.J.A. appeared to be "relieved" and responded: "I'd be very happy." Liccardo concluded that termination of J.R.A.'s parental rights would "have next to no lasting effect" and that "[i]t would be in [S.J.A.'s] best interests to remain in a secure place where he has the love and affection of a family." Moreover, Liccardo opined, long-term foster care would not serve S.J.A's best interests in light of his age and his desire to be adopted.

Dr. Wendy Matthews conducted an evaluation for DYFS of S.J.A.'s "social and emotional psychological status and his relationship with his foster family." During her February 23, 2001, evaluation of the child, Matthews utilized "projective techniques," including drawings and stories which, she found, reflected the positive nature of the interactions between S.J.A. and his foster family while at the same time suggesting S.J.A.'s "ambivalence or confusion about the accessibility to the home." She noted that this latter attitude was not "surprising given [S.J.A.'s] awareness of his foster child status." Moreover, the drawings suggested "feelings of inadequacy and insecurity."

During the clinical interview portion of her evaluation, Matthews observed S.J.A. and his foster parents engaging in pleasant and respectful interrelationships, and noted that S.J.A. "was perfectly comfortable with them." Additionally, Matthews observed, S.J.A.'s foster mother "was very sensitive to [S.J.A.'s] feelings and

needs," and had expressed pride in his progress. Matthews defined attachment as "a reciprocal enduring emotional and physical affiliation between the child and care giver," and concluded that S.J.A. had a secure attachment to his foster mother, to whom he referred as "mother" and upon whom he relied as a child does a mother. Matthews explained that S.J.A.'s foster mother was

> able to anticipate [S.J.A.'s] needs and plan for them in advance. And [S.J.A.] appears to trust that she will serve as his protector and his provider and his guide. And I saw an openness and an honesty in the communication between them which facilitates that. These qualities in a relationship are like the cornerstone of attachment and that's what children use as a foundation so that when they move into adulthood and they're establishing families of their own, they know how to do it. . . .

According to Matthews, the disruption of this strong attachment with his foster mother would "be pretty cataclysmic" for S.J.A., who would be forced to "start from the beginning." Matthews explained that although S.J.A. had successfully adapted to the disruption in his relationship with M.Y.J.P. at a very young age, "[a]nother disruption at this critical juncture in [S.J.A.'s] life when he is just at the precipice of moving into his teenage years would do irreparable damage to him."

Moreover, Matthews opined, adoption as opposed to long-term foster care was in S.J.A.'s best interests because S.J.A.

> is the only one in the [foster] family at this point who is not a permanent part of the family. Everyone else in the family has permanency

> promised to them but [S.J.A.]. So, he would feel different about that.
>
> The second thing is that when a child is moving into the adolescent years, it's good for them not to have a whole lot of choices about where they might go instead. It's good for parents to say okay, you're stuck with us and we've got to make it work. That way, the tie stays tied, knotted. And the base is secure. And so as they spread their wings and mess up sometimes, they still know that the base is there. So, it helps them developmentally.
>
> The third thing about that is that [S.J.A.] . . . said I want to be adopted. I want my name to be the same last name[,] meaning I want to feel like I belong. And, he's been there six and a half, almost seven years. He celebrated his ninth birthday and no one has ever promised him permanency. And . . . he clearly deserves permanency.

Thus, Matthews concluded, continued foster care would deprive S.J.A. of the sense of stability, permanency, and belonging that he needed.

The factual bases for the opinions rendered by Drs. Liccardo and Matthews on bonding and other relational issues between S.J.A. and the foster parents were confirmed in the trial judge's *in camera* interview with the child and in the testimony of the foster mother.

IV

The trial court's reasons for terminating the parental rights of both M.Y.J.P. and J.R.A. were articulated at great length, both orally and in writing. The opinions are comprehensive, cogent and compassionate. The factual

findings and conclusions at the base of the termination decision are well supported by substantial, credible evidence in the record and we are, therefore, bound by them. *See Cesare v. Cesare,* 154 *N.J.* 394, 411-13 (1998); *Rova Farms Resort, Inc. v. Investors Ins. Co.,* 65 *N.J.* 474, 484 (1974). After reviewing the record in the light of the written and oral arguments advanced by the parties, and applying prevailing legal standards and doctrines to the facts found, we are in substantial agreement with Judge Council's expressed rationales in applying the best-interests-of-the-child standard of *N.J.S.A.* 30:4C-15.1a; *see also Division of Youth and Family Servs. v. A.W., supra,* 103 *N.J.* at 604-11, and the results he reached based thereon. The reasons articulated in respect of both parents were ample bases for terminating their parental rights. For the sake of completeness, we summarize them.

In applying the first statutory factor, *N.J.S.A.* 30:4C-15.1a(1), *i.e.,* whether "[t]he child's safety, health or development has been or will continue to be endangered by the parental relationship," the court found that M.Y.J.P. had relinquished her parental responsibilities in that she had

> voluntarily agreed to allow S.J.A. to come to the United States with his father, under the unrealistic expectation, that she too would be brought over to the United States. . . . This understanding was made with M.Y.J.P.'s full knowledge that J.R.A. had a wife, who went with him to the United States. This court, however, finds M.Y.J.P.'s testimony to be incredulous in that respect. . . . Moreover, M.Y.J.P.'s failure to request S.J.A.'s return to her custody, even after she was advised that he was placed in foster care, by inference is evidence of her intent to relinquish her parental responsibility. Her inaction to have

> S.J.A. returned, supported by the unrealistic expectation that J.R.A. would bring her to the United States, led to this unfortunate situation, which prevented her from providing the essential parenting functions, which resulted in S.J.A.'s placement with DYFS.

Furthermore, the court found that M.Y.J.P. had failed to sustain a relationship with S.J.A. in that she had no contact with the child and was conflicted in her plans for caring for him. The court rejected M.Y.J.P.'s argument that she was unable to parent because she could not obtain a visa. The rejection was based on the finding that M.Y.J.P. did not apply for a visa until 2001, when S.J.A. had already been in foster care for seven years. The court considered this effort as "too little too late." Moreover, the court found that

> physically being with the child was not the only way she could have expressed an interest in parenting S.J.A. While S.J.A. was in the United States, M.Y.J.P. failed to communicate with the child by phone, send letters, or small gifts through DYFS or defense counsel until this litigation had begun. M.Y.J.P. failed to make any attempt to keep the parent-child bond alive.

Thus, the court concluded that "S.J.A.'s health and development have been endangered by M.Y.J.P.'s failure to perform any parental function[.]"

Similarly, with regard to J.R.A., the court found that "J.R.A.'s lack of contact with S.J.A. due to his recurring incarcerations has resulted in J.R.A.'s failure to perform any parenting functions for S.J.A. for at least the past four years."

Applying the second statutory factor, *N.J.S.A.* 30:4C-15.1a(2), that "[t]he parent is unwilling or unable to eliminate the harm facing the child," and that delaying placement will add to that harm, the court found that M.Y.J.P. had failed to provide a safe and stable home for S.J.A., noting that

> M.Y.J.P. asserts that at the time she gave her child to J.R.A., Haiti was in political turmoil and it was unsafe for S.J.A. to remain in the country and that fact somehow should be weighed in her favor. Although the Court certainly sympathizes with M.Y.J.P., it does not mean that this Court should find that it negates her parental responsibility to S.J.A.
>
> * * * Instead, M.Y.J.P. made the conscious and informed decision for S.J.A. to remain in the United States because she wanted to remain in school and lacked the financial means to care for S.J.A. In short, the court finds that M.Y.J.P.'s actions are demonstrative proof of her unwillingness to provide a safe and stable home for S.J.A.

That failure, the court opined, ultimately "led to the development of a strong seven-year relationship between S.J.A. and his foster family" which "should not be broken."

Regarding J.R.A., the court found that "J.R.A.'s failure to eliminate his drug addiction, as well as, his frequent incarcerations, has led to J.R.A.'s failure to eliminate the harm facing S.J.A.," that is, the absence of appropriate parenting by reason of J.R.A's drug addiction and criminal activity.

The third statutory element requires that DYFS show it has made reasonable efforts to reunite the family and had considered alternatives to termination. *N.J.S.A.*

30:4C-15.1a(3). The court characterized this prong as "the most significant challenge raised by [M.Y.J.P.'s] counsel." The court found

> pivotal, the fact that in this case, M.Y.J.P. did not request for S.J.A. to be returned to her custody and care in Haiti. If M.Y.J.P. had demanded that S.J.A. be returned, then this Court would have serious concerns as to whether additional efforts should have been made by DYFS to M.Y.J.P. Perhaps, DYFS would have had an obligation to go further in contacting federal agencies, such as the Immigration and Naturalization Services or the United States Department of State, to facilitate the return of the child to Haiti. This Court, however, need not concern itself with that hypothetical, as the record is unequivocally clear that M.Y.J.P. communicated to DYFS that she did not want S.J.A. sent back to Haiti, but instead requested that S.J.A. stay in the United States.
>
> Furthermore, the Court finds that the painful truth is that M.Y.J.P. had expressed to DYFS from the time that S.J.A. was placed in foster care, up until the time of these proceedings, that she had no interest in reunification and therefore, DYFS's obligation under the law must be viewed in that context.

With regard to J.R.A., the court found that DYFS had provided him with "a myriad of services," including drug counseling, supervised visitation, and psychological counseling, all to no avail.

The final statutory factor is that the "[t]ermination of parental rights will not do more harm than good." *N.J.S.A.* 30:4C-15.1a(4). The court found that S.J.A.'s foster mother had expressed an unequivocal intent to adopt the child,

and that the "bonding between M.Y.J.P. and S.J.A. is non-existent." Thus, the court found that "termination of M.Y.J.P.'s parental rights will not do S.J.A. more harm than good." Similarly, with regard to J.R.A., the court found that "termination of J.R.A.'s parental rights will not do more harm than good for S.J.A. and that severance of J.R.A.'s parental ties is the only viable remedy."

Finally, in this last regard, the court addressed S.J.A.'s best interests and found that S.J.A.'s right to permanency overrode M.Y.J.P.'s parental rights. The court found that it would not be in S.J.A.'s best interests "to break the strong ties S.J.A. has forged with his foster mother[,] for him to be tumultuously sent back to a foreign country, with a different language, to a biological parent, who he does not even remember and could not communicate with, due to the language barrier."

As to J.R.A., the trial court noted that his drug addiction had "limited his ability to form a bond with S.J.A., thus promoting the formation of a profound bond between the child and his foster parents." J.R.A. had "allowed his drug addiction to take priority over his ability to [parent]." He had no realistic plan to care for the child and had suggested a deferral of permanency through long-term foster care so that his own relational needs could be served. In concluding that termination of J.R.A.'s parental rights was "the only viable remedy," the court found the fourth-prong-test to be satisfied because J.R.A. "is unable and unwilling to care for S.J.A. and by way of his warped rationale expects the child[ ] to care for him."

We find no error in the trial court's evaluations of the parenting capacities of M.Y.J.P. and J.R.A. as demonstrated by their behavior regarding their son, S.J.A., and

such plans for his future as the parents may have articulated. On the merits, entry of the judgment terminating the parental rights of both M.Y.J.P. and J.R.A. was well warranted.

V

With respect to M.Y.J.P., however, this case presents independent questions of personal jurisdiction and due process uncommonly encountered in guardianship matters. There are no special factors pertaining to J.R.A. Both he and his son, S.J.A., were subject individually to the personal jurisdiction of the court.

A.

Despite the fact that the father and son are both citizens of a foreign country, their parent-child relationship was manifestly within the court's subject matter jurisdiction, and the court had personal jurisdiction over both of them. The State's *parens patriae* interest in the welfare of children does not spring from citizenship – or, in the term employed by J.R.A., "refugee" status – or from domicile, but rather from the presence of a child in this State for a sufficient amount of time to justify the exertion of governmental authority on his behalf for his protection. *Fantony v. Fantony,* 21 *N.J.* 525, 535-36 (1956); *Finlay v. Finlay,* 148 *N.E.* 624, 625 (N.Y. 1925); *see also Bergen v. Bergen,* 439 *F.*2d 1008, 1013 (3rd Cir. 1971); *Helton v. Crawley,* 41 *N.W.*2d 60, 73-76 (Iowa 1950). Were it otherwise, no child who is a citizen of another country or from a sister state could be eligible for state protection while present here. Neither J.R.A. nor S.J.A. were merely sojourning in New Jersey. They had moved here by J.R.A.'s

choice; they had settled here; and they had resided here for fully seven years by the time the case was tried. *Cf. N.J.S.A.* 2A:34-28 to -52, the Uniform Child Custody Jurisdiction Act (jurisdiction in custody matters is based upon the child having resided in the State for six months or more). There is simply no basis for applying a specially limited best-interests test based on citizenship, as J.R.A. urges. New Jersey's *parens patriae* obligation to protect and promote the welfare of children extends to all children resident in this State, undiluted by the fact that they or their parents may be non-citizens. *Fantony, supra,* 21 *N.J.* at 535.

B.

The State's interest in the well-being of S.J.A. is the same in respect of both of his parents, conferring subject matter jurisdiction over issues bearing upon the child's best interests. But M.Y.J.P. is in a special position. Unlike J.R.A., she was never physically subject to the jurisdiction of this court, and she argues that sufficient "minimum contacts" with this jurisdiction were lacking to support the trial court's exercise of jurisdiction over her in relation to her parental status with respect to S.J.A.

We adopt fully as supported by substantial evidence in the record made herein, *see Cesare, supra,* 154 *N.J.* at 411-13; *Rova Farms, supra,* 65 *N.J.* at 484, the trial court's findings that M.Y.J.P. voluntarily sent S.J.A. to the United States (New Jersey) and then availed herself of DYFS's services in caring for the child. The question of first impression before us is whether the State may adjudicate M.Y.J.P.'s personal interests in her parental status, *i.e.,* whether the State may assert personal jurisdiction over

M.Y.J.P. in this regard, notwithstanding that she has never been physically present here. M.Y.J.P. raises, as well, other equally profound questions regarding the procedures developed and applied by the trial court to deal with the special circumstances of the case, arguing that they did not comport with due process requirements and were, even more generally, fundamentally unfair.

1.

Addressing M.Y.J.P.'s argument that the trial court lacked *in personam* jurisdiction to adjudicate the termination complaint as to her because "minimum contacts" standards had not been satisfied, Judge Council opined that the court had

> obtained jurisdiction over [M.Y.J.P.'s] person by her latter actions, or lack thereof, as she refused to have the child returned to Haiti. The demand that the child remain in the State of New Jersey and continue to be cared for by the forum State clearly equates to [M.Y.J.P.'s] "purposefully availing" herself of the benefits of the forum and all its laws have to offer.
>
> The Court concedes that [M.Y.J.P.] had never been to New Jersey nor did she specifically send her child to the State of New Jersey. More important, is the fact that the child has been a ward of the State of New Jersey since his father placed him in foster care in 1994. Clearly [M.Y.J.P.] receives the benefit of knowing that her child is being cared for without being required to perform any parental responsibility whatsoever. . . .

Further, the court found that

> [M.Y.J.P.] is requesting the State to continue to care for her child. Thus, she has "purposefully availed" herself of the benefits of the State, thereby allowing the Court to exercise personal jurisdiction. It is certainly reasonable that a parent would be haled into Court for not supporting a child as it is each parent's duty to care for his/her children. Thus, it is also reasonable that [M.Y.J.P.] be amenable to suit within the State of New Jersey. . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson,* 444 *U.S.* 286, 291, 100 *S. Ct.* 559, 564, 62 *L. Ed.* 2d 490, 497 (1980). A New Jersey court may, however, exercise *in personam* jurisdiction over a nonresident to the "uttermost limits permitted by the United States Constitution." *Avdel Corp. v. Mecure,* 58 *N.J.* 264, 268 (1971). *See also Severinsen v. Widener Univ.,* 338 *N.J. Super.* 42, 46 (App. Div.), *certif. denied,* 170 *N.J.* 205 (2001).

Due process requirements are satisfied when a defendant has sufficient "minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 *U.S.* 310, 316, 66 *S. Ct.* 154, 158, 90 *L. Ed.* 95, 102 (1945) (quoting *Milliken v. Meyer,* 311 *U.S.* 457, 463, 61 *S. Ct.* 339, 343, 85 *L. Ed.* 278, 283 (1940)). *See also Blakey v. Continental Airlines, Inc.,* 164 *N.J.* 38, 66 (2000); *Lebel v. Everglades*

Marina, Inc., 115 *N.J.* 317, 322 (1989); *A.R. v. M.R.*, 351 *N.J. Super.* 512, 519 (App. Div. 2002).

a.

We accept as a beginning point the doctrinal underpinning for the "minimum contacts" rule as offered by M.Y.J.P. "Purposeful acts" [of a] party, directed toward a state are required, which render it reasonable for the defendant to anticipate "being haled into court there." *World-Wide Volkswagen, supra,* 444 *U.S.* at 297, 100 *S. Ct.* at 567, 62 *L. Ed.* 2d at 501. For a state court to exercise jurisdiction, a defendant must have purposely availed himself or herself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz,* 471 *U.S.* 462, 475, 105 *S. Ct.* 2174, 2183, 85 *L. Ed.* 2d 528, 542 (1985). M.Y.J.P. concedes, however, that the "minimum contacts' . . . principle has never been applied to a termination of parental rights matter in this State." Indeed, New Jersey follows the majority approach in cognate matters that personal jurisdiction is not required to modify an order for custody or visitation under the Uniform Child Custody Jurisdiction Act ("UCCJA"), *N.J.S.A.* 2A:34-28 to -52, provided that a party receives notice and an opportunity to be heard. *Genoe v. Genoe,* 205 *N.J. Super.* 6, 15 (App. Div. 1985).

In *Genoe, id.* at 13-14, we cited *Shaffer v. Heitner,* 433 *U.S.* 186, 208, n.30, 97 *S. Ct.* 2569, 2582, n.30, 53 *L. Ed.* 2d 683, 700, n.30 (1977), as recognizing adjudications of status, such as matters pertaining to the custody of children residing here, as an exception to the "minimum contacts" requirement. 205 *N.J. Super.* at 13-14. *See also*

Matsumoto v. Matsumoto, 335 *N.J. Super.* 174, 181 (App. Div. 2000) ("[t]here is no real contest to the proposition that New Jersey has jurisdiction to decide issues relating to . . . custody"), *aff'd as modified,* 171 *N.J.* 110 (2002)); *Schuyler v. Ashcraft,* 293 *N.J. Super.* 261, 289-90 (App. Div. 1996) (personal jurisdiction not required when court exercises jurisdiction over custody matters), *certif. denied,* 147 *N.J.* 578 (1997); *Schmidt v. Schmidt,* 227 *N.J. Super.* 528, 532-34 (App. Div. 1988); *Balestrieri v. Maliska,* 622 *So.*2d 561, 563 (Fla. Dist. Ct. App. 1993) (applying *Shaffer* "status" exception to custody cases); *In Interest of S.A.V.,* 837 *S.W.*2d 80, 84 (Tex. 1992) (custody determinations are status adjudications not dependent upon personal jurisdiction over the parents). *Cf. Ivaldi v. Ivaldi,* 147 *N.J.* 190, 197-204 (1996).

Nevertheless, neither the United States nor New Jersey Supreme Courts have expressly extended the "status" exception to proceedings involving the termination of parental rights. Other state courts remain divided on this issue, some applying a conventional minimum-contacts analysis, *see In Interest of M.A.C.,* 261 *S.E.*2d 590, 596 (1979); *In Interest of Doe,* 926 *P.*2d 1290, 1296 (Haw. 1996); *Matter of Laurie R.,* 760 *P.*2d 1295, 1297 (N.M. Ct. App. 1988); *In re Trueman,* 393 *S.E.*2d 569, 570 (N.C. Ct. App. 1990); and others applying the status exception, see *Matter of Interest of M.L.K.,* 768 *P.*2d 316, 319 (Kan. Ct. App. 1989); *In re Williams,* 563 *S.E.*2d 202, 205 (N.C. Ct. App. 2002); *In re Adoption of Copeland,* 43 *S.W.*3d 483, 487 (Tenn. Ct. App. 2000); *In Interest of M. S. B.,* 611 *S.W.*2d 704, 706 (Tex. App. 1980); *State ex rel. W.A.*, 63 *P.*3d 100 (Utah 2002).

Given this State's well-established commitment to protecting the welfare of children resident here, we now

hold not only that S.J.A.'s presence in New Jersey over an extended time conferred subject matter jurisdiction over questions bearing upon his welfare, including the parent-child relationship, but also that M.Y.J.P.'s conduct and related facts subjected her parental status to the jurisdictional sway of this State under the status exception, notwithstanding that she, herself, has never been present here. Apart from one fleeting request, immediately withdrawn, M.Y.J.P. never demanded S.J.A.'s return to Haiti; she had acceded to S.J.A.'s removal from Haiti to the United States, and she thereafter expressed the wish on several occasions that he remain in New Jersey subject to DYFS's care and oversight. S.J.A.'s extended period of parentally-sponsored residence in this State, *i.e.*, almost nine years since arriving and more than eight years since M.Y.J.P. first indicated to DYFS that she wished the child to remain in New Jersey, are sufficient bases upon which to predicate this State's jurisdiction over her status as S.J.A.'s parent. We recognize and subscribe to the idea that the parties in parental termination cases, given the gravity of the issues and the relational finality of a judgment terminating parental rights, should be accorded the greatest possible protection, even more than that afforded in custody cases, which are always subject to review and modification on a changed circumstances analysis. But that is no reason not to adjudicate fully issues bearing upon a status subject to this State's *parens patriae* interests.

b.

Even though we have determined that the trial court's judgment was a valid adjudication of issues over which the State had acquired subject matter jurisdiction as well as

personal jurisdiction by reason of the status exception, we are also persuaded that personal jurisdiction had been acquired over M.Y.J.P. in the conventional sense sufficient to overcome the preclusionary feature of the "minimum contacts" principle.

It is well established that personal jurisdiction may be specific or general, and the measure of minimum contacts required as a predicate for a valid decretal exercise depends on which type of jurisdiction is asserted. *Lebel, supra,* 115 *N.J.* at 323. A court's jurisdiction is "specific" if the cause of action "arises directly out of a defendant's contacts with the forum state." *Waste Mgmnt., Inc. v. Admiral Ins. Co.,* 138 *N.J.* 106, 119 (1994), *cert. denied,* 513 *U.S.* 1183, 115 *S. Ct.* 1175, 130 *L. Ed.* 2d 1128 (1995). A court's jurisdiction is general if the cause of action "is not related directly to the defendant's contacts with the forum state," but is instead based "on the defendant's continuous and systematic activities in the forum. . . ." *Ibid.* All of M.Y.J.P.'s contacts with New Jersey bore upon the subject matter of this cause of action; and the question is whether those contacts were sufficient to warrant the exercise of specific personal jurisdiction.

In the context of specific jurisdiction, whether the defendant's contacts were sufficient is determined on a case-by-case basis and depends on "the relationship among the defendant, the forum, and the litigation." *Shaffer, supra,* 433 *U.S.* at 204, 97 *S. Ct.* at 2580, 53 *L. Ed.* 2d at 698; *Waste Mgmnt., supra,* 138 *N.J.* at 122-23; *see also A.R. v. M.R., supra,* 351 *N.J. Super.* at 519. "The 'minimum contacts' requirement is satisfied so long as the contacts resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff." *Blakey, supra,* 164 *N.J.* at 67 (citing *World-Wide Volkswagen Corp.,*

supra, 444 *U.S.* at 297-98, 100 *S. Ct.* at 567-68, 62 *L. Ed.* 2d at 501). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contact[s]," *Blakey, supra,* 164 *N.J.* at 67 (quoting *Burger King Corp. v. Rudzewicz, supra,* 471 *U.S.* at 475, 105 *S. Ct.* at 2183, 85 *L. Ed.* 2d at 542), and that she could reasonably anticipate being haled into court there. *Ibid.* (quoting *World-Wide Volkswagen, supra,* 444 *U.S.* at 297, 100 *S. Ct.* at 567, 62 *L. Ed.* 2d at 501). "An intentional act calculated to create an actionable event in a forum state will give that state jurisdiction over the actor." *Waste Mgmnt., supra,* 138 *N.J.* at 126 (citing *Calder v. Jones,* 465 *U.S.* 783, 791, 104 *S. Ct.* 1482, 1488, 79 *L. Ed.* 2d 804, 813 (1984)). *See also Kam-Tech Sys. Ltd. v. Yardeni,* 340 *N.J. Super.* 414, 429 (App. Div. 2001) ("it must be determined whether the defendant has purposely availed himself of jurisdiction in the forum state").

Here, M.Y.J.P. purposefully availed herself of this forum in a manner sufficient to satisfy "minimum contacts" requirements. Although M.Y.J.P. did not herself bring the child into New Jersey, she knew that the child was to be brought from Haiti to the United States; and once she learned that S.J.A. was in DYFS's care, she consistently requested that DYFS keep the child here and care for him. We continue to be mindful of the April 10, 1995 conversation with a caseworker in which M.Y.J.P. asked for S.J.A.'s return to Haiti, but she immediately withdrew that request and instead requested that S.J.A. remain in New Jersey where he would have a "better life." In her *de bene esse* deposition, M.Y.J.P. denied having asked the caseworker to return S.J.A. to Haiti, and claimed that she would not have agreed to S.J.A.'s return

even if DYFS had promised to send her a monthly food and clothing allowance. "They did not ask me that, and I would not have agreed for them to send him back. I would have preferred for him to stay over there." By the time of the deposition, however, she said she wished to have the child returned to her in Haiti, although she preferred, as she had all along, to be permitted to enter the United States to discharge her parental duties here; but she also expressed a desire that the State continue to provide for S.J.A.'s needs.

In re Doe, supra, 926 *P.*2d 1290, and *In re Trueman, supra,* 393 *S.E.*2d 569, relied upon by M.Y.J.P., are distinguishable. In *In re Doe,* the child was born in Australia to a Philippine citizen, the mother, and an American citizen, the father. The father brought the two-to-three-month-old child to Hawaii, where he intended to resolve an issue with the Veteran's Administration. The mother returned to the Philippines, explaining that she had "reluctantly agreed" to let the father take the child because their Australian visas were expiring, and because the couple mistakenly thought the child would need a visa to accompany her to the Philippines. 926 *P.*2d at 1292.

Shortly after arriving in Hawaii, the father asked the Philippine Consulate to care for the child, and Hawaii's Department of Human Services sought termination of the mother's parental rights. *Ibid.* Throughout the proceedings, the mother "regularly corresponded with the court and with social workers, pleading for the return of her [child]." *Id.* at 1293. On that basis, the Hawaii Supreme Court reversed the order terminating the mother's parental rights holding that the mother had "neither purposefully directed an act toward, nor availed herself of the

privilege of conducting activities in, the State of Hawaii." *Id.* at 1297.

In *In re Trueman, supra,* 393 *S.E.*2d at 570, the children were brought to North Carolina by the mother. The father never visited the state, and his contacts were limited to sending support payments pursuant to a Wisconsin court order. *Ibid.* Apparently, the father never engaged in any communication with officials of the State and did not avail himself of their services or authority. These "meager contacts" were deemed "insufficient to support the exercise of jurisdiction over him" in a termination of parental rights case.

By way of contrast here, M.Y.J.P. consistently asked DYFS to care for the child. Thus, although M.Y.J.P. did not bring S.J.A. into New Jersey and did not know initially that this State was his ultimate destination, once the child was in DYFS's custody, this State provided for the child's well-being, both as it was statutorily required to do and at M.Y.J.P.'s continuing behest. M.Y.J.P. forewent her parental responsibility to care and provide for the child by not insisting upon his return to Haiti, and instead chose, even if for altruistic reasons at the time, to request and allow the State of New Jersey to step into the role of provider. In doing so, she availed herself of this State's services to provide for her child's medical, educational, physical, and psychological needs. Even at trial, M.Y.J.P. asked the State to continue indefinitely providing for S.J.A.'s needs. By taking this position consistently she certainly could reasonably anticipate that a court in this State would be called upon to act in pursuit of the State's *parens patriae* responsibilities for the child. *See World-Wide Volkswagen, supra,* 444 *U.S.* at 297, 100 *S. Ct.* at 567, 62 *L. Ed.* 2d at 501; *Blakey, supra,* 164 *N.J.* at 67.

We reject M.Y.J.P.'s argument that her terse responses to overtures by DYFS cannot constitute the "purposeful" conduct sufficient to satisfy the "minimum contacts" test. In support of that argument, M.Y.J.P. cites to *Kulko v. Superior Court of California,* 436 *U.S.* 84, 94, 98 *S. Ct.* 1690, 1698, 56 *L. Ed.* 2d 132, 142 (1978), (quoting *Hanson v. Denckla,* 357 *U.S.* 235, 253, 78 *S. Ct.* 1228, 1240, 2 *L. Ed.* 2d 1283, 1298 (1958)), in which the Supreme Court stated that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." But M.Y.J.P. omits the balance of the Court's observation in *Kulko,* also quoting *Hanson,* that " [i]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State." *Ibid.* Clearly, just the fact that M.Y.J.P. responded to DYFS's overtures is not alone sufficient to satisfy minimum contact requirements. It is the content of those responses, primarily her repeated requests that this state care for her child, that suffice.

Finally, M.Y.J.P. contends that the trial court's finding of purposeful availment fails to recognize that DYFS had taken a position that it would never return the child to Haiti, and therefore M.Y.J.P.'s willingness to have the child stay here was "simply unwitting acquiescence to circumstances already beyond her control." DYFS conceded that this case had been "red flagged," meaning a temporary interruption of its decision-making process calling for court review prior to the return of a child to his or her birth family. *See N.J.S.A.* 30:4C-61. But, as DYFS points out, there is no indication in this record that M.Y.J.P. had been aware of this development, and thus it could have played no part in her decision to allow the child

to remain. There was, in short, no real effort by M.Y.J.P. to seek the child's return.

2.

M.Y.J.P. argues further that the procedures adopted by the trial court were fundamentally unfair and lacking in adherence to principles of due process of law. She contends specifically that her rights were violated by the court's failure to secure her presence at the termination hearing or arrange for her to participate telephonically. We reject those arguments, as well.

The record discloses that the court made efforts to arrange for M.Y.J.P. either to attend the trial or to participate telephonically, but was unable to effect either alternative. In an effort to make the best of a difficult situation, the court, at the close of DYFS's case-in-chief, directed that the trial be recessed to allow a Creole version of the testimony to be sent to M.Y.J.P. M.Y.J.P. was then given more than a month to review and discuss the testimony with counsel. The trial was reconvened and M.Y.J.P. was given the opportunity to recall DYFS's witnesses for cross-examination and to present a telephonic deposition and video recording, which was viewed by the court and admitted into evidence.

The United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *U.S. Const.* amend. XIV, § 1. Similarly, although Article I, paragraph 1 of the New Jersey Constitution "does not enumerate the right to due process" it nonetheless, "protects against injustice and, to that extent, protects 'values like those encompassed by the principle[ ] of due process.'" *Doe v. Poritz,* 142 *N.J.* 1, 99

(1995) (quoting *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568 (1985)). Entitlement to procedural due process protections does not depend on citizenship. All persons subject to a state's authority may claim its benefits. *See Mathews v. Diaz,* 426 *U.S.* 67, 77-78, 96 *S. Ct.* 1883, 1890, 48 *L. Ed.* 2d 478, 488-89 (1976); *see also Jean v. Nelson,* 472 *U.S.* 846, 872-76, 105 *S. Ct.* 2992, 3006-09, 86 *L. Ed.* 2d 664, 682-85 (1985) (Marshall, J., dissenting).

Due process requires adequate notice and a fair opportunity to be heard. *Matter of C.A.,* 146 *N.J.* 71, 94 (1996); *Borough of Keyport v. Maropakis,* 332 *N.J. Super.* 210, 220-21 (App. Div. 2000); *Schneider v. Cty. of East Orange,* 196 *N.J. Super.* 587, 595 (App. Div. 1984), *aff'd,* 103 *N.J.* 115, *cert. denied,* 479 *U.S.* 824, 107 *S. Ct.* 97, 93 *L. Ed.* 2d 48 (1986). It is a flexible concept and calls for such procedural protections as the particular situation demands. *Gilbert v. Homar,* 520 *U.S.* 924, 930, 117 *S. Ct.* 1807, 1812, 138 *L. Ed.* 2d 120, 127 (1997); *Zinermon v. Burch,* 494 *U.S.* 113, 127, 110 *S. Ct.* 975, 984, 108 *L. Ed.* 2d 100, 114-15 (1990); *New Jersey Parole Bd. v. Byrne,* 93 *N.J.* 192, 209 (1983). Evaluation of whether due process requirements have been met is "an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake" in the circumstances at hand. *Lassiter v. Department of Soc. Servs. of Durham Cty.,* 452 *U.S.* 18, 24-25, 101 *S. Ct.* 2153, 2158, 68 *L. Ed.* 2d 640, 648 (1981).

The protections needed to ensure due process where governmental action is to be taken depend on a careful balancing of three factors: (1) identification and specification of the private interest that will be affected by the

official action; (2) assessment of the risk that there will be an erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) evaluation of the governmental interest involved, including the added fiscal and administrative burdens that additional or substitute procedures would require. *See Mathews v. Eldridge,* 424 *U.S.* 319, 335, 96 *S. Ct.* 893, 903, 47 *L. Ed.* 2d 18, 33 (1976); *see also Santosky v. Kramer,* 455 *U.S.* 745, 754, 102 *S. Ct.* 1388, 1395, 71 *L. Ed.* 2d 599, 607 (1982) (applying *Eldridge* analysis to termination proceeding); *Matter of C.A., supra,* 146 *N.J.* at 93 (precise protections needed to ensure due process depends on careful balancing of *Eldridge* factors); *Doe v. Poritz, supra,* 142 *N.J.* at 99 (holding that examination of a procedural due process claim requires a court "first [to] assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient"). Although the *Eldridge* factors were posited for determining whether procedures used, short of an evidentiary hearing, to determine eligibility for benefits met due process requirements, they can also be applied to evaluate the due process qualities of procedures used by a trial court in place of more traditional trial processes in an effort to cope with circumstantial exigency.

The fundamental liberty interest of parents in the care, custody, and management of their children is protected by the Fourteenth Amendment. *Santosky, supra,* 455 *U.S.* at 753, 102 *S. Ct.* at 1390, 71 *L. Ed.* 2d at 606. Moreover, although no New Jersey court has directly applied the *Eldridge* analysis to a termination proceeding, our Supreme Court has held that "[t]erminating parental

rights implicates fundamental liberty interests that are protected under the United States Constitution." *In re Adoption of Children by G.P.B., Jr.,* 161 *N.J.* 396, 404 (1999); *see also In re Guardianship of K.H.O.,* 161 *N.J.* 337, 346 (1999) (parents have a fundamental constitutional right to enjoy a relationship with and raise their children). Moreover, that protection continues even when a child is placed in foster care. *In re Guardianship of K.H.O., supra,* 161 *N.J.* at 347. M.Y.J.P.'s interests in this matter clearly qualify for due process protection.

The second *Eldridge* factor as applied in the context before us requires that we assess whether the procedures used resulted in a deprivation of rights or interests that would have been more fully protected if other procedures had been used. *See Eldridge, supra,* 424 *U.S.* at 335, 96 *S. Ct.* at 903, 47 *L. Ed.* 2d at 33. Here, too, no New Jersey case has used this analysis to evaluate the procedures used in a termination case. However, in applying the second *Eldridge* prong to a review of a decision by DYFS regarding sexual abuse by a teacher, we have explained that application of this factor involves a determination of whether the process afforded adequate protection to the party's interests, and if not, whether additional procedural safeguards were available that would have sufficed. *See Matter of Allegations of Sexual Abuse at East Park High Sch.,* 314 *N.J. Super.* 149, 164 (App. Div. 1998). However, even if a person has a constitutionally protected interest, it does not necessarily follow that the individual must be afforded an opportunity for an adjudicatory hearing. *See Eldridge, supra,* 424 *U.S.* at 332-49, 96 *S. Ct.* at 901-10, 47 *L. Ed.* 2d at 31-42; *In re R.P.,* 333 *N.J. Super.* 105, 113 (App. Div. 2000).

It is well established as a matter of due process principle that procedural requirements are more demanding in parental termination cases than in ordinary civil actions, including other types of cases dealing with parental rights. *See, e.g., Division of Youth & Family Servs. v. K.M.*, 136 *N.J.* 546, 557 (1994); *In re Guardianship of A.A.M.*, 268 *N.J. Super.* 533, 543 (App. Div. 1993); *Division of Youth & Family Servs. v. V.K.*, 236 *N.J. Super.* 243, 252-53 (App. Div. 1989), *certif. denied*, 121 *N.J.* 614 (1990); *In re Vasquez*, 501 *N.W.*2d 231, 234 (Mich. Ct. App. 1993) (due process requires that the petitioner justify termination by a heightened burden of proof); *Horvatich v. Texas Dep't of Protec. and Reg. Servs.*, 78 *S.W.*3d 594, 596 (Tex. App. 2002) (same); *In re Termination of Parental Rights to Jayton S.*, 246 *Wis.*2d 1, 629 *N.W.*2d 768, 775 (Wis. 2001) (termination proceedings require heightened legal safeguards against erroneous decisions). But none of these cases can be taken to mandate particular procedures for all cases.

An action for termination of parental rights is a civil action. The requirements of due process do not confer a constitutional right of confrontation or mandate a parent's presence at the trial. *Orville v. Div. of Family Servs.*, 759 *A.*2d 595, 599 (Del. 2000) (no constitutional due process right to be present at termination hearing); *In re Vasquez, supra*, 501 *N.W.*2d at 234-35 (incarcerated parent does not have absolute right to be present at termination hearing); *State ex rel. Children, Youth and Families Dep't. v. Ruth Anne E.*, 974 *P.*2d 164, 168 (N.M. Ct. App. 1999) (due process requirements do not mandate personal appearance where parent is serving prison sentence outside jurisdiction); *Cook v. Boyd*, 881 *F. Supp.* 171, 175 (E.D. Pa. 1995) (due process does not confer right of confrontation or

require parent's presence at termination hearing); *In Interest of Darrow,* 649 *P.*2d 858, 861 (Wash. Ct. App. 1982) (right to appear personally and defend not guaranteed by due process where prisoner was afforded opportunity to defend through counsel and by deposition). The question to be answered is not whether particular procedures were used, but rather whether those procedures which were employed were appropriate and adequate to protect the interests at stake.

Procedural due process standards require the opportunity for meaningful participation by the person at risk of limitation in any trial in which important rights or interests are to be adjudicated. On balance, given the circumstances of a particular case, the *Eldridge* factors may require an opportunity to appear in person at a hearing or trial. *See Matter of Allegations of Sexual Abuse, supra,* 314 *N.J. Super.* at 164 (trial type proceeding required in DYFS case with sexual abuse allegations); *see also Matter of S.M.,* 738 *P.*2d 883, 885 (Kan. Ct. App. 1987) (court erred in denying incarcerated parent's application to attend termination hearing). Yet, "the precise method of participation should generally be left to the discretion of the trial judge." *In re Adoption of Edmund,* 739 *N.E.*2d 274, 277 (Mass. App. Ct. 2000) (courts should be given some flexibility, consistent with the facts of each case, in choosing from among available options, including but not limited to video or telephonic conferencing).

Due process evaluations typically call for a balancing of pertinent factors in the situation at hand. A particular situation may allow for other forms of participation besides attendance, such as testimony by telephone or deposition. Other states have held that a parent who is incarcerated or otherwise prevented from attending a

termination trial can be afforded due process where the parent receives notice, is represented by counsel, and is given an opportunity to testify by telephone or deposition. *See, e.g., Pignolet v. State Dep't of Pensions and Sec.,* 489 *So.*2d 588, 591 (Ala. Civ. App. 1986); *In re Juvenile Appeal,* 446 *A.*2d 808, 812 (Conn. 1982); *In Interest of Baby Doe,* 936 *P.*2d 690, 695 (Idaho Ct. App. 1997); *In Interest of J.S.,* 470 *N.W.*2d 48, 52 (Iowa Ct. App. 1991); *See In re Randy Scott B.,* 511 *A.*2d 450, 453 (Me. 1986); *In re Adoption/ Guardianship No. 6Z980001,* 748 *A.*2d 1020, 1024 (Md. Ct. Spec. App. 2000); *State ex rel. Children, Youth and Families Dep't, supra,* 974 *P.*2d at 169; *Matter of James Carton K., III,* 665 *N.Y.S.*2d 426, 429 (N.Y. App. Div. 1997); *State in Interest of M.A.V. v. Vargas,* 736 *P.*2d 1031, 1034 (Utah Ct. App. 1987).

Given the somewhat unusual circumstances attending this case, the trial court could not provide for M.Y.J.P.'s appearance or for her telephonic participation. Instead, the court carefully and thoughtfully crafted a procedure in which M.Y.J.P., who was represented by aggressive, exceptionally competent counsel, was given the opportunity to testify by *de bene esse* deposition, review the trial transcripts, consult with her attorney, engage in deferred cross-examination of the Division's witnesses, and present rebuttal evidence. There has been no showing that her able counsel's cross-examination was adversely affected by the fact that his client was not present in the courtroom. In fact, through her deposition taken during the course of the trial, M.Y.J.P. was able to address fully any issue raised in the proceedings, including her decision to allow S.J.A. to remain in New Jersey. Thus, the process accorded to M.Y.J.P. was adequate to protect her interests, and there is no indication that any procedural safeguards

could have been implemented that would have been more fulfilling.

Matter of Allegations of Sexual Abuse, supra, 314 *N.J. Super.* 149, cited by M.Y.J.P., is clearly distinguishable. In that case the appellant, a teacher, was accused of inappropriate sexual conduct with a student.[6] The appellant sought review of DYFS's determination that the charges were "substantiated" and of its decision to include her name in the Division's central registry of substantiated abusers. *Id.* at 153. We held that the procedure accorded to the appellant, namely the right to submit a sworn statement, "was inadequate to test the charges because the outcome depended upon a credibility evaluation of [the appellant] and the witnesses against her, who she was not allowed to cross-examine." *Id.* at 164. In fact, when tested in a trial-type tenure proceeding, the appellant's accusers had been revealed as "liars and plotters." *Id.* at 165.

In contrast here, the procedural safeguards that were employed amply protected M.Y.J.P.'s rights. Thus, the second *Eldridge* factor weighs in favor of a determination that M.Y.J.P.'s due process rights were met.

Finally, we must consider and balance the third *Eldridge* factor: the government's interests, including the financial and other burdens imposed by the procedures contended to be necessary. In applying that factor, we recognize two strong concerns on the part of the State: that the *parens patriae* responsibility to preserve and promote the welfare of the child must be seen as including

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[6] The accusation was later determined to have been unfounded.

the child's important interests in promptness, permanency and competent parenting; and the policy objective, based on fiscal and administrative considerations, to promote efficient and effective adjudication and reduce the cost and burden of the proceedings. *See Santosky, supra,* 455 *U.S.* at 766, 102 *S. Ct.* at 1401, 71 *L. Ed.* 2d at 615; *see also In re Guardianship of K.H.O., supra,* 161 *N.J.* at 347 (parental rights are not absolute and are tempered by the State's *parens patriae* responsibility to protect the welfare of children). The State's interests must be balanced against M.Y.J.P.'s unquestionable interest in a process with sufficient procedural integrity to protect her fundamental rights as a parent.

Within the government interest is the concern that delays in the adjudication of parental rights cases result in additional costs, and more importantly, impact negatively upon a child's need for permanency. In that regard, a New York court explained that in balancing the third factor

> the children's right to a prompt determination of their status is just as important as the interest of the father, and that an indefinite delay of the children's right is a more egregious deprivation than the father's loss of his right to be present at the hearing. This right of the father is only one part of his due process rights in these proceedings, and its loss will not necessarily deprive him of a fair hearing. The risk that his absence will lead to an erroneous decision can be reduced or eliminated by permitting him to give testimony by deposition, if possible, and by his representation at trial by his attorney. The loss by the children of their day in court will, on the other hand, deprive them completely of their right to a judicial determination of their status.

[*Matter of Raymond Dean L.*, 490 *N.Y.S.*2d 75, 78 (App. Div. 1985).]

See also In re Adoption/Guardianship No. 93321055, 687 *A.*2d 681, 697 (Md.) (if reunification is not possible or in the child's best interests, the state has a special interest and an urgent duty to obtain a nurturing and permanent placement for the child), *cert. denied,* 520 *U.S.* 1267, 117 *S. Ct.* 2439, 138 *L.Ed.* 2d 199 (1997). We conclude, in summary, that the *Eldridge* factors were satisfied by the procedures used when weighed in the light of M.Y.J.P.'s private rights and interests and balanced with them, more particularly that the alternative measures intelligently employed by the trial court were more than adequate to deal with the issues in this case. They satisfied the "meaningful manner" due process requirement for a hearing. *See Goldberg v. Kelly,* 397 *U.S.* 254, 267, 90 *S. Ct.* 1011, 1020, 25 *L. Ed.* 2d 287, 299 (1970). M.Y.J.P., through able counsel, had "an effective opportunity to defend by confronting . . . adverse witnesses and by presenting [her] own arguments and evidence orally," *ibid.,* after sufficient time to confer with counsel in meeting the Division's case against her. *See Nicoletta v. North Jersey Dist. Water Supply Comm'n,* 77 *N.J.* 145, 165-66 (1978) (quoting *Morrissey v. Brewer,* 408 *U.S.* 471, 488-89, 92 *S. Ct.* 2593, 2604, 33 *L. Ed.* 2d 484, 498-99 (1972)). Accordingly, we can find no constitutional error in the procedures employed by the trial court.

VI

We also discern no misapplication of discretion in the trial court's ruling, challenged by M.Y.J.P., admitting into evidence Dr. Matthews's testimony addressing her bonding evaluation regarding the child and the foster family.

M.Y.J.P. argues that without an evaluation of S.J.A.'s bonding with her, the Matthews evaluation was prejudicially incomplete. In the light of the indisputable fact that S.J.A. had no memory of his birth mother, we regard that issue to be of insufficient merit to warrant at-length discussion. *R.* 2:11-3(e)(1)(E). Judge Council took this view, essentially, in his detailed statement of reasons for denying the motion articulated orally on August 6, 2001. We are in substantial agreement with his decisional rationale.

VII

For the reasons we have stated, the trial court's judgment terminating the parental rights of M.Y.J.P. and J.R.A. in respect of S.J.A. is affirmed.

Not for Publication Without the
Approval of the Committee on Opinions.
Superior Court of New Jersey, Chancery Division,
Family Part, Mercer County

NEW JERSEY DIVISION OF YOUTH AND
FAMILY SERVICES, Plaintiff, v. J.R.A.,
Defendant, and M.Y.J.P., Defendant.

In the Matter of the Guardianship of S.J.A., A Minor.

Argued Dec. 3, 2001.
Decided Feb. 1, 2002.

Octavia Melendez, Senior Deputy Attorney General, argued the cause for the plaintiff, the New Jersey Division of Youth and Family Services (David Samson, Attorney General, attorney; Mary Jane Lembo-Cullen, Deputy Attorney General, of counsel; Ms. Lembo-Cullen on the brief).

Marty M. Judge and James M. Scott, III, argued the cause for defendant M.Y.J.P. (Mr. Scott, III on the brief).

Brian Paul, argued the cause for defendant, J.R.A. (Mr. Paul on the brief)

Lori A. Johnson, for the minor child, S.J.A. (Ms. Andrea Dobin of record, and Ms. Johnson on the brief.)

COUNCIL, J.S.C,

This case requires the Court to consider whether the Division of Youth and Family Services (hereinafter "DYFS" or "the Division") has established, by a clear and convincing standard, that the termination of J.R.A. and M.Y.J.P.'s parental rights, is in the best interests of the minor child, S.J.A., under the statutory standards enumerated in *N.J.S.A.* 30:4C-15.1.

PROCEDURAL HISTORY

On June 4, 1998, the Division filed a Complaint for Guardianship on behalf of S.J.A. and his half-sibling, J.R.A., Jr. The Division sought termination of the parental rights of the children's birth father, J.R.A. and of S.J.A.'s birth mother, M.Y.J.P and J.R.A., Jr.'s birth mother, I.C. This action was instituted pursuant to *N.J.S.A.* 30:4C-15 *et seq.* On June 18, 1998, the Division served M.Y.J.P. with a Summons and a copy of the Guardianship Complaint via regular and certified mail. On September 24, 1998, a case management conference was held. At which time, this Court made provision for the appointment of counsel for J.R.A. and it directed the Division to notice M.Y.J.P. of the next court date.[1]

On October 5, 1998, the Division sent a second Summons and a copy of the Guardianship Complaint to M.Y.J.P. via regular and certified mail. (J-10) (Stipulation 36). On October 22, 1998, a case management conference was held and a psychological evaluation of J.R.A. and a bonding evaluation of J.R.A. and the children were ordered.

On December 9, 1998, pro bono counsel was appointed for M.Y.J.P. by the Court. (Stipulation 38). On March 11, 1999, a case management conference was held. At that time, M.Y.J.P.'s counsel advised the Court of its intention to file a motion requesting that the Division's petition

[1] There are two orders reflecting the Court's order of September 24, 1998. In the October 5, 1998 Order, the name of defense counsel and the law guardian were inadvertently omitted. The October 23, 1998 Order reflects the identities of those initially appointed counsel.

against M.Y.J.P. be dismissed for lack of jurisdiction. It was then determined that the children's cases be bifurcated, with the understanding that J.R.A., Jr.'s case would proceed to trial and that S.J.A.'s case would be reviewed regarding the jurisdictional argument. It should be noted that this matter was significantly delayed because of the Court's, and counsel's inability, to have timely communications with M.Y.J.P. in Haiti. Generally, attempts to speak to her would take weeks because of Haiti's lack of telephonic infrastructure.

On April 30, 1999, J.R.A., through appointed counsel, filed a motion requesting supervised visitation with both children. On May 21, 1999, this Court denied J.R.A.'s request for supervised visitation.[2] (Stipulation 40).

On June 18, 1999, a motion was filed on behalf of M.Y.J.P. to dismiss the Complaint against her for lack of jurisdiction.[3] (Stipulation 42).

On August 5 and 11, 1999, a Guardianship trial was conducted as to the minor child, J.R.A., Jr., only. J.R.A. appeared by writ for trial on August 5, 1999, but failed to appear for the completion of the Guardianship trial on August 11, 1999. At the time of the August 1999 trial, Exhibits P-1 through P-28, and D-1 through D-3, and S-1,

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[2] At the time of J.R.A.'s application, the Court was aware that J.R.A. was incarcerated and it had reviewed a copy of Dr. John Liccardo's report dated May 7, 1999.

[3] Opposition and reply briefs were filed on or about October 27, 1999, November 29, 1999, December 16, 1999, February 24, 2000, February 25, 2000, March 2, 1999, and March 3, 2000. The March 2, 2000 letter brief advised the Court and counsel of record that S.J.A.'s foster mother had expressed the desire to adopt him.

were marked into evidence.[4] On August 11, 1999, the trial court rendered its decision with regard to the Division's petition for guardianship of J.R.A., Jr. The parental rights of J.R.A. and I.C. to the minor child, J.R.A., Jr., were terminated; and guardianship of J.R.A., Jr. was awarded to DYFS on August 25, 1999.[5] (J-12) (Stipulation 45).

On February 15, 2000, the Court, counsel for the Division and M.Y.J.P. participated in a telephone conference, which precipitated the submission of additional briefs addressing the issues of permanency for S.J.A. and procedural due process for M.Y.J.P. in the event of trial. On June 22, 2000, this Court rendered a written decision on the issues of notice and jurisdiction. This Court found that sufficient notice had been given to M.Y.J.P. Specifically, that M.Y.J.P. had received the Summons and Complaint not once, but twice; and it was further found that M.Y.J.P. had acknowledged receipt of the pleadings and responded in writing to them on two occasions.[6] This Court further found that M.Y.J.P. had "minimum contacts" with the State of New Jersey so as not to offend "traditional

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[4] With the exception of Exhibits 19, P-24, P-25, P-26, and P-27, the exhibits were incorporated by reference in the Stipulations of counsel for the purposes of the August/September 2001 trial. See Stipulation 44. (1T46:5-10).

[5] This Court's Judgment was not appealed.

[6] Pursuant to *R.* 4:4-4(b) and (c), service may be effected through certified or ordinary mail, and service shall be effective for obtaining in personam jurisdiction if the defendant answers the complaint or otherwise appears in response to the complaint. By sending the two acknowledgment letters, M.Y.J.P. in effect 'answered' or 'appeared in response' to the complaint for guardianship. M.Y.J.P.'s written responses make evident that she was on notice of the pending termination action.

notions of fair play and substantial justice." In this regard, this Court noted that it obtained jurisdiction over M.Y.J.P. "by her latter actions, or lack thereof."

Also on June 22, 2000, this Court issued a proposed order. At the request of defense counsel, this order stayed by this Court so as to allow defense counsel to communicate with M.Y.J.P. to determine whether an interlocutory appeal would be filed on her behalf. The order was then filed on September 12, 2000.

On October 2, 2000, M.Y.J.P. filed with the Appellate Division a Notice of Motion for leave to appeal, for summary disposition and for a stay of the trial court's September 12, 2000 order. On November 2, 2000, the Appellate Division denied the relief requested.

On November 22, 2000, M.Y.J.P. filed with the Supreme Court a Notice of Motion for leave to appeal and for a stay pending final disposition of the appeal. On December 18, 2000, the Supreme Court denied the motion for leave to appeal and dismissed it as moot.

On December 13, 2000, a case management conference was held, where this Court ordered, among other things that, "in the event any party desires to conduct psychological/psychiatric and/or bonding evaluations of M.Y.J.P., S.J.A., and/or the foster parent by an expert of his/her own selection, said evaluations shall be conducted and resulting reports exchanged among counsel no later than March 16, 2001.[7]" This Court also ordered that,

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[7] J.R.A. elected not to have his expert issue any reports. (1T52:23-24).

"defense counsel shall attempt to arrange for M.Y.J.P. to travel to New Jersey for the purpose of trial. . . ."

During a case management conference on January 31, 2001, this Court made a provision for M.Y.J.P. to testify by phone.

On March 9, 2001, M.Y.J.P. filed a Notice of Motion on Short Notice to clarify certain procedural due process requirements to be adhered to at trial and to exclude testimony or other proofs adverse to M.Y.J.P. regarding her fitness as a parent and her relationship with her son. The Division had no objection and an order was entered on March 13, 2001 setting forth the relief requested.

During a case management conference on March 30, 2001, the Mercer County Trial Court Administrator advised the Court, and counsel, of their unsuccessful efforts to secure M.Y.J.P.'s presence at trial or to have her participate by video/telephone conference. The Court was further advised that Haiti lacked the telephonic or technical capabilities to assist the Court in its efforts to have M.Y.J.P. participate contemporaneously with the Court proceedings. The Trial Court Administrator was advised by Haitian authorities that any telephonic communication of any significant duration was an impossibility. Therefore, on this date and again on April 25, 2001, the parties addressed the unlikelihood that M.Y.J.P. would be granted a Visa to travel to the United States and that procedural safeguards needed to be formulated for the trial to proceed in her absence. Mediation was also agreed upon by the parties.

On May 23, 2001, counsel of record, the DYFS caseworker and M.Y.J.P. participated in a mediation session by way of phone conference arranged by defense counsel. On

May 30, 2001, the Division filed a Notice of Motion seeking to set a trial date and to proceed in the absence of M.Y.J.P. and further seeking to implement alternative procedural safeguards to ensure M.Y.J.P.'s meaningful participation at trial.

On May 31, 2001, M.Y.J.P. filed a Notice of Motion requesting that the guardianship litigation be dismissed "because of the impossibility of providing trial procedures that satisfy procedural due process under the United States and New Jersey Constitutions." M.Y.J.P. also requested that long-term foster care be ordered for S.J.A.

On July 13, 2001, this Court denied the relief requested by M.Y.J.P. and it set forth alternative trial procedures, which were to be implemented to ensure M.Y.J.P.'s meaningful participation at trial. These procedures were as follows:

1) The Division shall present its case-in-chief.

2) The defendant(s) shall be permitted to cross-examine the Division's witnesses.

3) A transcript of (1) and (2) shall be prepared.

4) The transcript shall be translated from English to Creole.

5) The Court would recess to allow M.Y.J.P.'s counsel opportunity to review the transcript with their client.

6) Counsel for M.Y.J.P. shall be permitted to call back the Division's witness(es) for further cross-examination of issue(s) that are raised in consultation with M.Y.J.P.

7) J.R.A. shall be permitted to testify.

8) M.Y.J.P. shall be permitted to testify through one of the following methods:

a) Defense counsel shall be permitted to arrange a telephone deposition of their client; or

b) Defense counsel shall be permitted to retain counsel in Haiti to conduct a deposition of M.Y.J.P.; or

c) Defense counsel shall be permitted to travel to Haiti to conduct a video deposition of M.Y.J.P[8].

Defense counsel, after consulting with their client, arranged for a video deposition.

On July 18, 2001, due to the prohibitive cost of the written translations of the transcripts, which had been ordered on July 13, 2001, the Court modified the procedure for M.Y.J.P.'s participation as follows:

> ORDERED that, at the time of the presentation of the Division's witnesses, a Creole interpreter shall be present in this Courtroom to translate and record on a tape-recorder said testimony for the benefit and use of M.Y.J.P. Said recording and an appropriate tape player shall be sent to M.Y.J.P. in Haiti so that she may review the

[8] Also on July 13, 2001, the Court, over the objection of the Division that the Office of the Public Defender should be held responsible for all or part of the cost incurred in this trial procedure, ordered that the Division assume the cost of the depositions and transcriptions; but the Court reserved in the Division the right to appeal this decision.

testimony alone and then with the assistance of counsel . . . ; and it is further

ORDERED that M.Y.J.P.'s counsel shall, at their election, either retain the services of a Haitian attorney to assist with an audio-visual deposition of M.Y.J.P. or conduct a telephone deposition of M.Y.J.P. In reference to said deposition, the Division's counsel shall be permitted to listen to said deposition at the time it is being conducted and to cross-examine M.Y.J.P. if necessary.

On July 27, 2001, M.Y.J.P. filed a Notice of Motion to exclude the testimony of Dr. Wendy Matthews at trial. On August 6, 2001, this Court denied the motion.

The trial in this matter took place on August 6 and 7, 2001, and September 10, 11, and 12, 2001. The video-deposition of M.Y.J.P. took place on August 30, 2001.

FINDING OF FACTS – M.Y.J.P.

J.R.A. fathered two children, J.R.A., Jr. born May 25, 1988, who is not the subject of this proceeding, as J.R.A.'s and I.C.'s, the biological mother's parental rights to J.R.A. Jr. were terminated on August 11, 1999 by the Hon. Lawrence Lerner, J.S.C. DYFS was awarded guardianship of J.R.A., Jr. on August 25, 1999.

J.R.A.'s second son, S.J.A., was born August 5, 1992 in Haiti and is the subject of this litigation. M.Y.J.P. is his biological mother, who resides in Haiti.

J.R.A. and M.Y.J.P. met when M.Y.J.P was an 18-year old student at the same school in Haiti, in which J.R.A. was employed as a teacher from 1990 to 1994. (3T9:23-25; 3T9:6-17; 4T152:10 to 4T153:2)[9]. J.R.A. and M.Y.J.P. were not married and did not reside together before the birth of S.J.A. (3T10:12-14).

From August 1992 to May 1994, M.Y.J.P. and S.J.A. resided in M.Y.J.P.'s father's home, which was located in the provinces of Haiti. During the first two years of S.J.A.'s life, J.R.A. did not visit the child or maintain any contact with S.J.A. (3T56:7-16; 4T16115-17).

In May 1994, J.R.A. brought M.Y.J.P. and S.J.A. to Port-au-Prince, Haiti, where M.Y.J.P. and S.J.A. resided with her aunt. (3T42:14; 3T43:3). J.R.A. visited M.Y.J.P. and S.J.A. regularly until July 1994, when J.R.A. left Haiti and brought his two children, J.R.A., Jr. and S.J.A., with him and his wife, to the United States. (3T12:23-25).

M.Y.J.P. testified that she allowed J.R.A. to take S.J.A. to the United States with him under the expectation that she would also be brought over to the United States at a later date. However, when J.R.A. left Haiti, he was married to another woman, who went with him to the

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[9] "1T" refers to the transcript of the August 6, 2001 trial date.

"2T" refers to the transcript of the August 7, 2001 trial date.

"3T" refers to the transcript of the August 30, 001 deposition of M.Y.J.P.

"4T" refers to the transcript of the September 10, 2001 trial date.

"5T" refers to the transcript of the September 10, 2001 in camera interview of James.

"6T" refers to the transcript of the September 11, 2001 trial date.

United States. Furthermore, M.Y.J.P. testified she had been aware of this fact, but still believed that she would be sent for by J.R.A. to come to the United States. (3T:18:10-13). In July 1994, J.R.A., his wife and two children, arrived in the United States and settled in New Jersey. At that time, S.J.A. was almost two years old and J.R.A., Jr. was six years old. Apparently, shortly after arriving in this country, J.R.A. and his wife separated and he became the primary caretaker of the children.

DYFS first became involved on October 20, 1994, when a referral was received from the Lutheran Ministries Refugee Program. The referral alleged and it was subsequently substantiated, that J.R.A. had left the children home, without proper supervision. In an effort to remedy the situation, an after-school program and a neighborhood babysitter were arranged for the children with the help of the Lutheran Ministries Refugee Program.

DYFS received a second referral on November 16, 1994, from J.R.A., Jr.'s principal at the Grant School. The referral stated that J.R.A., Jr. arrived at school with a swollen, red left ear and that the top of his ear lobe was peeling. When J.R.A., Jr. was asked who had done this, he replied that his mother did it. School officials, however, knew that there was no mother involved and believed that it was J.R.A., who had hit the child. The school staff also reported that J.R.A., Jr. had old scars on his chest, back and arms. While waiting for J.R.A., Jr.'s release from the hospital, J.R.A. expressed his desire to DYFS officials that he wanted to surrender his parental rights and place J.R.A., Jr. up for adoption. J.R.A., Jr. had been having behavioral problems at home and at school. J.R.A. was experiencing difficulty dealing with J.R.A., Jr. and had the

additional stress of his wife leaving him shortly after their arrival in the United States.

Later, J.R.A. admitted to the DYFS caseworker that he had in fact used his belt to beat J.R.A., Jr., however, he denied pulling or hitting J.R.A., Jr.'s ear. The caseworker confronted J.R.A. about the legal implications of child abuse, but J.R.A. would not promise to stop using corporal punishment. J.R.A. explained to the DYFS caseworker that corporal punishment was an acceptable means of discipline in his native homeland of Haiti. When the caseworker discussed the possibility of signing a Voluntary Foster Care Agreement for J.R.A., Jr., J.R.A. insisted that he would only sign the agreement if DYFS placed both children in foster care. Thereafter, J.R.A. signed the Voluntary Foster Care Agreement for both children. On November 16, 1994, J.R.A., Jr. and S.J.A. were transported to an agency approved foster home.

In December 1994, J.R.A. informed DYFS that S.J.A.'s biological mother resided in Haiti. In January 1995, Ms. Paulette Tarica, a DYFS caseworker, assumed the management of the children's case. She had been instructed to initiate a search for the children's biological mothers in Haiti and to contact International Social Services. She was also instructed to continue working with J.R.A., the custodial parent, toward the goal of reunification.

On February 2, 1995, Ms. Tarica sought the assistance of International Social Services for the purposes of locating the birth mother and conducting a home evaluation. On March 6, 1995, a DYFS worker left a message for International Social Services inquiring about the status of the search for M.Y.J.P. in Haiti and also sent a letter to M.Y.J.P. in Haiti to an address that was provided by J.R.A.

On March 23, 1995, DYFS received a call from an International Social Services representative, indicating it could not locate M.Y.J.P. in Haiti without a more detailed address and that the file would be closed without further inquiry.

On March 23, 1995, M.Y.J.P. contacted DYFS in response to her receipt of DYFS's March 6, 1995 letter. M.Y.J.P., however, did not speak nor did she understand English. As a result, DYFS arranged to call her back with a Creole interpreter on April 10, 1995. Ms. Tarica testified that during her April 10th conversation with M.Y.J.P. she explained that: "After a child was in foster care, out of home placement for a year, that it was [DYFS's] mandate from the State to start looking at a permanent placement for this child. That it was very important for a child to have a family that he felt to be a permanent part of and that foster care was not considered to be a permanent placement for a child." (2T40;5-12). M.Y.J.P.'s initial response was to return the child to Haiti, however, before they could even discuss a transfer process, M.Y.J.P. changed her mind and asked that S.J.A. remain in New Jersey where he could have a better life. (2T37:8 to 2T39:14; 2T77;20-25). M.Y.J.P. also told Ms. Tarica that she would contact relatives, who might be in a position to care for the child and instructed her not to contact them, as she would do so and did not provide DYFS with the names and addresses of prospective relative care providers. (2T40:22 to 2T41:18). In addition, M.Y.J.P. informed the caseworker that she was unaware that S.J.A. was in foster care prior to receiving DYFS's March 6, 1995 letter. M.Y.J.P., however, later testified that as a result of DYFS's March 6, 1995 letter, she was aware that S.J.A. was in "an adoption home," and understood that she "could write back

or call . . .". (3T23:12-15). The conversation was concluded with the understanding that M.Y.J.P. could call DYFS collect through its 800 number if she had any further questions. (2T43:7-13).

At the time of trial, M.Y.J.P. testified that her April 10, 1995 conversation with Ms. Tarica was comforting and quoted Ms. Tarica as saying: "Ma'am, don't give yourself too much trouble, because the institution where the child is, the child is fine and secure. (3T20:19-22). M.Y.J.P. further testified that, during this conversation, Ms. Tarica "asked me if I wanted to take [S.J.A.] while he was small, and I said 'No'." (3T23:18-19). M.Y.J.P. elaborated: " . . . I agreed for [S.J.A.] to remain in the United States while he was small . . . I did not ask for him to return to Haiti." (3T24:15-25)[10]. She also admitted that an offer of money by DYFS to assist in the care of S.J.A. in Haiti would not have changed her desire that S.J.A. not be returned to her. In this regard, M.Y.J.P. stated:

> Q. If DYFS had agreed to send you a hundred dollars a month to pay for food in 1995, would you have agreed to take [S.J.A.] back?
>
> A. They did not ask me that, and I would not have agreed for them to send him back. I would have preferred for him to stay over there [in the United States]. (3T34:19-25).

On April 13, 1995, DYFS received a letter from M.Y.J.P., which stated that she was unable to care for S.J.A. because she was still in school and that she had

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[10] M.Y.J.P. did request photographs of S.J.A.; and Ms. Tarica thereafter sent photographs of him to M.Y.J.P. (3T30:5-10).

planned for J.R.A. to pay her tuition, but he never sent her the money. M.Y.J.P. also requested that DYFS send photographs of S.J.A. After April 13, 1995, neither DYFS, nor M.Y.J.P., initiated contact with the other until March 1998.

Ms. Tarica testified that she did not send M.Y.J.P. medical reports or progress reports regarding S.J.A. because "neither [J.R.A.] nor [M.Y.J.P.] nor any other relatives indicated any desire to have the child returned for any reason to Haiti." (2T99:10-13). Ms. Tarica went on to explain that "what drove a lot of this case decisions was the fact that [M.Y.J.P.] said, leave the child there, do not send him back to Haiti." Therefore, "there was not much more the Division could do, if anything, the Division could do, to bring [M.Y.J.P.] here . . ." therefore, "working with [M.Y.J.P.] was limited." (2T108:21 to 2T109:5). Ms. Tarica also testified that during that time DYFS worked with the custodial parent, J.R.A., who had custody and care of the child. From April 1995 to April 1998, M.Y.J.P. failed to maintain contact with DYFS by letter or telephone regarding S.J.A.'s welfare.

Communication between DYFS and M.Y.J.P. was reestablished on March 16, 1998, when DYFS sent a letter to M.Y.J.P., via regular and certified mail, advising her of DYFS's plan to petition the Court for guardianship of S.J.A. The certified mail was returned undeliverable, however, the regular letter had been received by M.Y.J.P, as indicated by M.Y.J.P.'s letter dated April 15, 1998, which was received by DYFS on May 11, 1998. M.Y.J.P.'s letter stated that her address was correct and that she had no plan for S.J.A., but wanted notice of the Court hearings. (See Plaintiff's Exhibit 13 from the August 5, 1999 trial date.)

DYFS filed the Complaint for Guardianship on behalf of S.J.A. and J.R.A., Jr. on June 4, 1998. On December 9, 1998, pro bono counsel was appointed by the Court for M.Y.J.P. In April 1999, DYFS contacted Interstate Services, who then instructed DYFS to contact International Social Services directly in order to perform a home assessment of M.Y.J.P.'s house because M.Y.J.P. was not in their operational area. (4T124:6-15). As a result, DYFS contacted International Social Services for the purpose of conducting a home assessment of M.Y.J.P.'s home in Haiti, however, they were advised that to complete the assessment could take up to five years.

From June 1999 through September 1999, M.Y.J.P., through counsel, requested that photographs of S.J.A. be sent to her. DYFS provided the requested photographs on September 19, 1999. In February 2000, M.Y.J.P., through counsel, made a request to speak with S.J.A. Interpreters were provided and the conversation took place at M.Y.J.P.'s counsel's office. It should be noted that M.Y.J.P. does not speak English and the child does not speak Creole, making it impossible for them to communicate without the assistance of translators. Furthermore, when the child was questioned during the in camera interview by the Court as to whether he remembered anything about M.Y.J.P., S.J.A. responded: "No." (5T37:12-17). After the February 2000 conversation with S.J.A., M.Y.J.P. made no further requests to arrange for any further communications with the child.

Between September 1997 and August 2001, the DYFS caseworker assigned to this case, Ms. Roebles, had no contact with M.Y.J.P., as she understood that all communication with M.Y.J.P. was to take place through her

attorneys. Lastly, M.Y.J.P. applied for a Visa in early 2001, but was denied entry to the United States.

FINDING OF FACTS – J.R.A.

On November 16, 1994, the children were placed in an agency approved foster home after the referral of J.R.A.'s use of corporal punishment on J.R.A., Jr. was substantiated. In December 1994, J.R.A. requested visitation with the children, which DYFS arranged. In January 1995, J.R.A. requested that DYFS return the children to him. On March 2, 1995, DYFS had a meeting with J.R.A. to discuss services that were available to him and advised him of what was expected of him before the children could be returned to his care. J.R.A. testified that he understood that he was required to take a drug test, attend counseling, maintain full-time employment and provide the children with a safe and stable home before the children could return to his care. (4T190:3-14; 4T191:9-10).

During 1995, DYFS referred J.R.A. to numerous services, all of which he failed to successfully complete. J.R.A. was referred for three drug screens and tested positive for cocaine on two of the three screenings. J.R.A. was found to have tampered with the third. When confronted about the results, J.R.A. explained that the drugs found were from his drug use in Haiti, thereby denying current drug use. DYFS referred J.R.A. to a drug-counseling program at New Horizon, but J.R.A. failed to complete the program. J.R.A. was referred to psychological counseling with a Creole-speaking therapist, yet, J.R.A. was terminated from the counseling due to his non-compliance.

From January 1995 to June 1995, J.R.A. was provided bi-weekly supervised visitation with the children. J.R.A., however, canceled many visits or appeared late. DYFS also attempted to locate J.R.A.'s relatives for possible placements for the children. DYFS received a response from J.R.A.'s relatives, whom resided in Haiti, asking for DYFS to bring them to New Jersey to care for the children, and if they were unable to do so, that DYFS should "keep the children while they are small." (See Plaintiff's Exhibit 15). Unfortunately, DYFS was not in a position to bring the relatives to the United States and thereafter, continued providing services to J.R.A.

During 1996, J.R.A. visited the children sporadically despite having the right of bi-weekly visitation. On September 10, 1997, J.R.A. was arrested by the Trenton Police Department for possession of a controlled dangerous substance and criminal mischief. J.R.A. pled guilty to these charges and was incarcerated on November 4, 1997. On December 10, 1997, J.R.A. entered into a Service Agreement with DYFS, in which, he agreed to attend a drug rehabilitation program at the Heartland Clinic. During 1997, J.R.A. visited with S.J.A. only two times.

On March 11, 1998, J.R.A. told the DYFS caseworker that he had no time to attend any counseling programs. On April 28, 1998, J.R.A. was arrested at the Quaker Bridge Mall on a theft charge. On June 9, 1998, J.R.A. was once again arrested at the Quaker Bridge Mall on a theft charge. J.R.A. was convicted on May 7, 1999 of the latter charge. During 1998, J.R.A. did not visit with S.J.A.

When the DYFS caseworker called J.R.A. on January 25, 1999, to inform of problems that J.R.A., Jr. was experiencing, J.R.A. responded that DYFS should take good care

of J.R.A., Jr., as he needed his son to take care of him when he got older.

Once again in June 1999, J.R.A. was arrested on theft charges. In August 1999, J.R.A. was arrested on a robbery charge, of which, he was later acquitted. Later in August 1999, DYFS contacted a relative of J.R.A. to inquire whether they had an interest in caring for the children. Unfortunately, the relative was uninterested.

On August 11, 1999, the trial court terminated J.R.A.'s parental rights to J.R.A., Jr. The Hon. Lawrence Lerner opined, "Is it better to have one [parent] who is not good and who's bad for you, than to have none? In this case, I believe it's better to have none." The trial court found that: "[W]hen you look at the overall picture of never completing anything, showing up when he wanted to, not showing up at other times, taking the drug test when he wanted to, failing it when the State wanted him to, I think that the overall picture shows someone who is in effect from the standpoint of the Court, both unwilling and unable to eliminate doing what he was doing, which would affect his care for this child." The trial court stated that, "the Division really went out of its way to continue to try to reunite this family beyond what would otherwise be considered a normal time period . . ." In conclusion, the trial court found that the alternative to termination "would be to continue the chaos that [J.R.A., Jr.] has been compelled to live in, with a father who is loving, but unable to deal with his own problems let alone deal with his child." Between August 5 and 11th, 1999, J.R.A. was released from jail. J.R.A. failed to appear for trial on August 11, 1999, despite the fact that on August 5, 1999, he had been given a notice by the Court to appear on August 11 (2T139:15-21).

After the completion of the Guardianship trial, J.R.A. contacted DYFS on February 8, 2000. When the DYFS caseworker asked whether J.R.A. was attending Narcotics Anonymous or Alcoholics Anonymous, he replied that he was planning to quit drugs on his own and that support groups were a waste of time. At that time, J.R.A. was unemployed and living with friends. (2T140:9 to 2T141:18).

On February 25, 2000, J.R.A. was arrested by the Lawrence Township Police for shoplifting at the Quaker Bridge Mall and released on a summons with a March 1, 2000 court date. On February 27, 2000, J.R.A. was once again arrested on shoplifting charges at the same mall on March 5, 2000. On February 23, 2001, J.R.A. was arrested at the Quaker Bridge Mall on a theft charge. Between February 2000 and February 2001, J.R.A. had no contact with DYFS.

On March 9, 2001, Dr. John Liccardo conducted a bonding evaluation of J.R.A. and S.J.A. A DYFS caseworker transported S.J.A. to the evaluation at the Mercer County Correctional Facility, at which time, S.J.A. told the caseworker that it seemed as though J.R.A. lived at the prison since his last contact with him was also there. Furthermore, S.J.A. told the caseworker that he guessed that J.R.A. "liked it there." (2T216:20 to 2T217:22). Between February 2000 and the March 9, 2001 bonding evaluation, J.R.A. failed to maintain contact with DYFS or send any cards or gifts to S.J.A. J.R.A. did not have any visitation with S.J.A. during that time.

In total, J.R.A. was arrested and incarcerated on at least eight occasions on theft charges between the years of 1997 and 2001. At the time of this trial, J.R.A. was incarcerated and uncertain as to when he was going to be

released. The only contact J.R.A. has had with S.J.A. since 1997 was during the course of the bonding evaluation that was conducted on March 9, 2001. When asked what J.R.A.'s plan was once he was released from prison, he testified that his plan was not to personally care for his son, but requested that the Court order S.J.A. into long-term foster care so that he could visit with S.J.A. (4T181:18-23; 4T196:1).

On January 31, 2002, Immigration and Naturalization Services advised the Court that J.R.A. is being detained in a Louisiana federal prison awaiting deportation.

LEGAL ANALYSIS

DYFS has brought this action to terminate the parental rights of J.R.A. and M.Y.J.P. under *N.J.S.A.* 30:4C-15.1a. That statute is referred to as the "best interests of the child" standard; it prescribes an integrated multi-element test that must be applied to determine whether termination of parental rights is in the best interests of the child. *IMO Guardianship of K.H.O.*, 161 *N.J.* 337 (1999). This standard was first adopted by the Court in *New Jersey Division of Youth & Family Services v. A.W.*, 103 *N.J.* 591, 512 (1986), and later codified in *N.J.S.A.* 30:4C-15.1a. *IMO Guardianship of D.M.H.*, 161 *N.J.* 365, 373 (1999). Under *N.J.S.A.* 30:4C-15.1a, termination of parental rights is necessary when:

(1) The child's safety, health or development have been or will continue to be endangered by the parental relationship;

(2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and

the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his foster parents would cause serious and enduring emotional or psychological harm to the child;

(3) The Division has made diligent efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and

(4) Termination of parental rights will not do more harm than good. [*N.J.S.A.* 30:4C-15.1a. (1998).]

These standards are neither discrete nor separate. *K.H.O.* at 348. They overlap to provide a composite picture of what may be necessary to advance the best interests of the children. *Id.*

Under *N.J.S.A.* 30:4C-15.1a(1), DYFS must demonstrate that the child's health and development have been or will continue to be endangered by the parental relationship. Id. When making that determination, the Court need not concentrate on finding the presence of physical abuse or neglect perpetrated by a birth parent. *IMO Guardianship of A.W.*, 103 N.J. 591, 605 (1986). It is a well settled principle that a birth parent does not have to physically harm their child for the "best interests standard" set forth in *N.J.S.A.* 30:4C-15.1 to be applicable, rather a birth parent's behavior can harm the relationship with the child by preventing it from progressing further. *In re Guardianship of A.A.M.*, 268 *N.J. Super.* 533, 547 (App. Div. 1993). Additionally, serious and lasting emotional and psychological harm that has happened as a result of a birth parent's action or inaction is also sufficient to satisfy the

first prong of the best interests standard. *IMO Guardianship of K.L.F.*, 129 *N.J.* 32, 44 (1992).

Additionally, the Court in *D.M.H.* found that the parent's failure to perform any parenting functions and to provide nurture, care and support for the child over three years constituted a parental harm to the child arising out of the parental relationship and is recognized under *N.J.S.A.* 30:4C-15.1a(1) and (2). *D.M.H.*, 161 N.J. 365 citing *K.H.O.*, at 352-354. Parents are not to be judged unfit because they lack resources or intelligence, but only by reason of conduct detrimental to the physical or mental health of the child specifically in the form of actual or imminent harm. *A.W.*, at 615-616.

Further, it is the trial court's function to analyze the potential for serious psychological damage to the child, which can be drawn from the evidence. In re *Guardianship of R.G. and F.*, 155 *N.J. Super.* 186, 194 (App. Div. 1977). The Court does not need to wait until the child is irreparably harmed by parental inattention or neglect in order to terminate parental rights. *D.M.H.*, at 383. As the Court noted in *A.W.*, "parental behavior is relevant only insofar as it indicates a further likelihood of harm to the child in the future." *A.W.*, at 616.

PRONG ONE – M.Y.J.P.

In this case, the Court finds that DYFS has established by clear and convincing evidence that S.J.A.'s health and development have been and will continue to be endangered by his parental relationship with M.Y.J.P under *N.J.S.A.* 30:4C-15.1a(1). In July 1994, M.Y.J.P. voluntarily agreed to allow S.J.A. to come to the United States with his father, under the unrealistic expectation,

that she too would be brought over to the United States. M.Y.J.P. testified that when J.R.A. left for the United States, she and J.R.A. had an understanding that upon J.R.A.'s arrival in the United States, he would send for her, as well as, help her financially while she still lived in Haiti. This understanding was made with M.Y.J.P.'s full knowledge that J.R.A. had a wife, who went with him to the United States. This Court, however, finds M.Y.J.P.'s testimony to be incredulous in that respect. Particularly, that M.Y.J.P. believed that J.R.A. would send for her to come to the United States, after traveling to the United States with a wife, whom she testified, she had knowledge of. The Court finds that defense counsel's argument that M.Y.J.P. did not have knowledge of the fact that he had a wife when he left for the States to be without merit. Moreover, M.Y.J.P.'s failure to request S.J.A.'s return to her custody, even after she was advised that he was placed in foster care, by inference is evidence of her intent to relinquish her parental responsibility. Her inaction to have S.J.A. returned, supported by the unrealistic expectation that J.R.A. would bring her to the United States, led to this unfortunate situation, which prevented her from providing the essential parenting functions, which resulted in S.J.A.'s placement with DYFS.

Furthermore, once S.J.A. was living in the United States, M.Y.J.P. had no contact with her son, whom she testified she had wanted a better life for. In March 1995, M.Y.J.P. knew S.J.A. was in foster care but allowed him to stay in DYFS's care. By 1997, M.Y.J.P. had not even sent a card or gift for the child, even though she knew how to get in contact with the child through DYFS. Further, from 1997 to 2001, M.Y.J.P. failed to perform any parenting functions for S.J.A., as she had no contact with the child.

When initially asked whether or not to send the child back in April 1995, she instructed DYFS to keep the child in New Jersey. Also, in February 1997, when she was once again asked whether she would like S.J.A. sent back to Haiti, she gave an ambivalent response. First, M.Y.J.P. asked for the child to be returned, then ultimately changed her mind during the same telephone conversation with DYFS. The evidence indicates that throughout her involvement with DYFS, M.Y.J.P. never requested for the child to be sent back to Haiti until her August 30, 2001 video deposition, after S.J.A. had been in foster care or almost seven years. Even at the time of her deposition, M.Y.J.P. was conflicted in what her plans were for caring for S.J.A.

During her deposition on August 30, 2001, M.Y.J.P. on direct examination was asked:

> Q. If you have a choice between having your parental rights terminated or having [S.J.A.] returned to Haiti, what would you prefer?
>
> A. I would prefer that he be returned to me in Haiti.
>
> Q. What if [S.J.A.] was able to stay in the United States but your parental rights were not terminated, would you prefer that?
>
> A. That would be preferable. . . . (3T35:24-3T36:5; 3T36:25-3T37:4).

On cross-examination by DYFS, M.Y.J.P. testified as follows:

> Q. When did you decide that you wanted your son to come to Haiti with you?
>
> A. Well, I decided now. . . .

* * *

Q. So if DYFS wants him in New Jersey, do you still want him to come to Haiti?

A. I would like for him to come and visit with me, I would like for him to come and talk to me, and then he could come back.

* * *

Q. . . . What you're saying is that it's okay with you if he stays here in New Jersey?

A. I agree for him to stay in New Jersey. I don't agree for my parental rights to be terminated. . . .

* * *

Q. Okay. I will ask you the question again. If parental rights are not terminated, its okay with you if he stays in New Jersey?

A. Whether my parental rights are terminated or whether my parental rights are not terminated, I feel that I am able to take care of him, so I would prefer that they send him to me in order for me to take care of him.

* * *

Q. . . . When was the first time you told anybody that you wanted your son returned to you?

A. I did not tell anyone that I wanted my son returned to me.

Q. So this is the first time that you have told anybody this, today?

A. Yes.

* * *

Q. So you did not make up your mind until we started speaking on the phone?

A. Yes. (3T47:9 to 3T51:9).

Additionally, M.Y.J.P. argues by inference that since she was unable to obtain a Visa to come to this country, she was unable to act as a parent to S.J.A. The Court, however, is not persuaded by that argument, as the painful fact is that M.Y.J.P. did not even apply for a Visa until 2001, which in this Court's opinion was too little too late. Furthermore, physically being with the child was not the only way she could have expressed an interest in parenting S.J.A. While S.J.A. was in the United States, M.Y.J.P. failed to communicate with the child by phone, send letters, or small gifts through DYFS or defense counsel until this litigation had begun. M.Y.J.P. failed to make any attempt to keep the parent-child bond alive. The Court in *In re Guardianship of JR.*, 174 *N.J.Super.* 211 (App. Div. 1980), opined, "Prolonged inattention by the natural parent that permits the development of disproportionately stronger ties between child and foster parents may lead to a bonding relationship the severing of which would cause profound harm – a harm attributable to the natural parent and cognizable under the standards set forth in *A.W.* . . ." *Id.* at 223.

Further, this case is analogous to *J.R.*, insofar as, the Court in *J.R.* found that harm was found in a circumstance where for almost two years after placement, the mother failed to make any effort to keep parental ties alive despite her knowledge that the child lived with a foster family. The Court in *J.R.* reasoned that any mother should reasonably foresee that strong ties of emotion might be forged, particularly in the absence of other ties, if strong and affirmative steps by the biological parents are not

taken to prevent that from happening. *Id.* at 222. M.Y.J.P., akin to the mother in *J.R.*, has failed to make any effort to prevent a bond from occurring between S.J.A. and his foster mother by remaining a silent bystander in S.J.A.'s life and has failed to play a role in his life after he immigrated to the United States. While S.J.A. was in foster care, M.Y.J.P. did nothing to sustain a relationship with him, even after she knew that he was living in foster care. Thus, M.Y.J.P.'s inaction to have S.J.A. returned, as well as, her failure to maintain contact with S.J.A., while he was in foster care, has demonstrated to the Court that S.J.A.'s health and development have been endangered by M.Y.J.P.'s failure to perform any parental function to S.J.A. Therefore, the Court finds DYFS has satisfied by clear convincing evidence that first prong of the "best interests" standard under *N.J.S.A.* 30:4C-15.1a(1).

PRONG TWO – M.Y.J.P.

The second prong is whether the parent is unable to eliminate the harm facing the child or unwilling to provide a safe and stable home for the child and that the delay of permanent placement will add to the harm. *N.J.S.A.* 30:4C-15.1a(2). While the second prong focuses on conduct that equates with parental unfitness, both prongs of the harm requirement, *N.J.S.A.* 30:4C-15.1a(1) and (2), are related to one another, and evidence that may support one prong, may also support the other prong, as part of a comprehensive basis for determining the best interests of the child. *See K.H.O.*, 161 *N.J.* at 348-49.

N.J.S.A. 30:4C-15.1a(2) may be met by indications of parental dereliction and irresponsibility, such as the inability to provide a stable and protective home or the

withholding of parental attention and care. *K.H.O.*, at 352. In *A.W.*, the Court opined, "No more or less is required of [parents] than that they will not place their children in substantial jeopardy to physical or mental health. *A.W.*, at 607. In contrast, *N.J.S.A.* 30:4c-15.1a(2) does not require this Court to determine whether the parents might have been victims of social circumstances beyond their control. *Id.* Here, M.Y.J.P. asserts that at the time she gave her child to J.R.A., Haiti was in political turmoil and it was unsafe for S.J.A. to remain in the country and that fact somehow should be weighed in her favor. Although the Court certainly sympathizes with M.Y.J.P., it does not mean that this Court should find that it negates her parental responsibility to S.J.A.

DYFS has established that M.Y.J.P. has been unable and unwilling to eliminate the harm facing S.J.A. Since M.Y.J.P. has been involved with DYFS, she has repeatedly insisted that DYFS should not send S.J.A. back to Haiti. In March 1995, M.Y.J.P. sent a letter to inform DYFS that she was not in a position to care for S.J.A. because she was in school and unable to support him. In April 1995, a DYFS caseworker called M.Y.J.P. and explained DYFS's procedures, as well as, S.J.A.'s need to have a permanent home, yet, M.Y.J.P. still failed to request for the child to be sent back to Haiti. Instead, M.Y.J.P. made the conscious and informed decision for S.J.A. to remain in the United States because she wanted to remain in school and lacked the financial means to care for S.J.A. In short, the Court finds that M.Y.J.P.'s actions are demonstrative proof of her unwillingness to provide a safe and stable home for S.J.A.

This failure has led to the development of a strong seven-year relationship between S.J.A. and his foster family. This filial relationship should not be broken merely

because M.Y.J.P. capriciously decided during her August 30 2001 video deposition, almost seven years after S.J.A. entered foster care, that she would like S.J.A. returned to Haiti. Thus, the Court finds that DYFS has satisfied the second prong of the "best interests" standard, which requires that the Court find that M.Y.J.P. is unwilling to provide a safe and stable home for the child and that delay of permanent placement will add to the harm under *N.J.S.A.* 30:4C-15.1a(2).

PRONG THREE – M.Y.J.P.

Section (3) of the "best interests" standard requires DYFS to undertake reasonable efforts to reunite the family. *N.J.S.A.* 30:4C-15.1a(3). Recent amendments to *N.J.S.A.* 30 4C-15.1a(3), have specified that the efforts by DYFS to assist parents in remedying the circumstances and conditions that led to the placement of the child must be "reasonable," thereby, replacing the adjective "diligent." The law does not require DYFS to make every absolute effort possible but must make "reasonable efforts" under the totality of the circumstances at eliminating the harm and to reunify the family. "Reasonable efforts" is defined by statute as:

> Attempts by an agency authorized by the Division to assist the parents in remedying the circumstances and conditions that led to the placement of the child and in reinforcing the family structure, including but not limited to:
>
> (1) consultation and cooperation with the parent in developing a plan for appropriate services;

(2) providing services that have been agreed upon, to the family, in order to further the goal of family reunification;

(3) informing the parent at appropriate intervals of the child's progress, development and health; and

(4) facilitating appropriate visitation. [*N.J.S.A.* 30:4C-15.1c.]

The third prong is satisfied if DYFS has sought out relatives or friends to care for the child, sends drug-addicted parent to drug treatment programs, provides housing assistance, daycare, parenting classes, financial assistance or medical referrals to parents. *D.M.H.*, at 387.

In this case, the issue of whether or not DYFS provided reasonable efforts to M.Y.J.P. was clearly the most significant challenge raised by defense counsel. In December 1994, J.R.A. informed DYFS that S.J.A.'s biological mother, M.Y.J.P., resided in Haiti. Soon after, in February 1995, DYFS sought the assistance of International Social Services to request that they conduct a search for M.Y.J.P. in Haiti. Ms. Tarica, the DYFS caseworker assigned to this case at that time, testified that she had been instructed by her supervisor to "initiate a search (for M.Y.J.P.), to contact International Social Services, and then to proceed working with the father toward reunification." (2T75:7-12). Ms. Tarica further testified that on February 2, 1995, she contacted International Social Services to help them find M.Y.J.P. in an effort to make her part of the planning for her two children. (2T33:13 to 2T34:1). Ms. Tarica then sent a letter to M.Y.J.P. at her last known address in Haiti. As a result of receiving that letter, M.Y.J.P. testified that she understood that, "I could write back or call, and (Ms.

Tarica) told me that my child was with a family in New Jersey and that he was safe." (3T23:12-15).

On March 23, 1995, M.Y.J.P. contacted DYFS but was unable to communicate due to the language barrier between the parties, however, DYFS arranged for a translated conference call at a later date. (2T36:16 to 2T37:4).

On April 10, 1995, DYFS arranged for a Creole interpreter to initiate a telephone call to M.Y.J.P. in Haiti. During that telephone conversation, M.Y.J.P. told DYFS that she had been unaware that S.J.A. had been placed in foster care, prior to receiving their March 6, 1995 letter. However, in M.Y.J.P.'s own testimony, she stated that even previous to her receipt of DYFS's March 6, 1995 letter, she had been aware that S.J.A. was "in an adoption house." (3T59:21 to 3T60:5). She also sent a letter, which stated that she was unable to care for S.J.A. at that time because she was still in school and was experiencing financial difficulties paying for her school tuition. The Court finds that this provides further proof that she was well aware of S.J.A.'s circumstances in the United States.

Moreover, in April 1995, M.Y.J.P. informed a DYFS caseworker that there were two relatives that might be in a position to care for S.J.A. M.Y.J.P. told DYFS that she did not have their addresses and would prefer contacting them herself. Unfortunately, DYFS never received any communication from M.Y.J.P. concerning potential maternal relatives that might be able to care for S.J.A.

Defense counsel also makes the argument that DYFS should have contacted the United States Department of State or Immigration and Naturalization Services about assisting M.Y.J.P. to immigrate to the United States. The Court, however, finds the defense counsel's argument

without merit because once M.Y.J.P. clearly indicated that she did not want the child returned, DYFS had no obligation, nor any reason to provide immigration efforts. Further, Ms. Tarica also testified that, after April 10, 1995, she did not contact the United States Department of State, an immigration attorney or Lutheran Refugee Services to explore whether M.Y.J.P. could come to the United [sic] because she understood that "it was not the Division's role to bring somebody from a country where there was a civil war to the State of New Jersey to parent their child." (2T88:9-12). Ms. Tarica also testified that she did not send progress reports or medical reports concerning S.J.A. to M.Y.J.P., (2T96-97), nor did she consider arranging for S.J.A. to visit with M.Y.J.P. in Haiti. (2T99:6-8). She explained that she did not do so because, "neither [J.R.A.] nor [M.Y.J.P.] nor any of the other relatives indicated any desire to have the child returned for any reason to Haiti." (2T99:10-13).

In regard to DYFS's efforts to work with M.Y.J.P. toward reunification with S.J.A., Ms. Tarica further testified:

> To me in regard to diligent effort in this case, there was one parent [J.R.A.] who had custody and care of this child and that was the parent that was in New Jersey and that was the parent we removed from and that was the parent that we were currently working with for reunification. (2T88:25 to 2T89:5).

She also testified:

> . . . [J.R.A.] would have been considered the custodial parent and he was certainly the parent that we were primarily working with. I think what drove a lot of this case decisions was the fact that M.Y.J.P. said leave the child there, do

> not send him back to Haiti. And it was my understanding that there was not much the Division could do, if anything, the Division could do to bring her here. So, therefore, working with her was pretty limited. (2T108:21 to 2T109:5).

The Court finds pivotal, the fact that in this case, M.Y.J.P. did not request for S.J.A. to be returned to her custody and care in Haiti. If M.Y.J.P. had demanded that S.J.A. be returned, then this Court would have serious concerns as to whether additional efforts should have been made by DYFS to M.Y.J.P. Perhaps, DYFS would have had the obligation to go further in contacting federal agencies, such as the Immigration and Naturalization Services or the United States Department of State, to facilitate the return of the child to Haiti. This Court, however, need not concern itself with that hypothetical, as the record is unequivocally clear that M.Y.J.P. communicated to DYFS that she did not want S.J.A. sent back to Haiti, but instead requested that S.J.A. stay in the United States.

Furthermore, the Court finds that the painful truth is that M.Y.J.P. had expressed to DYFS from the time that S.J.A. was placed in foster care, up until the time of these proceedings, that she had no interest in reunification and therefore, DYFS's obligation under the law must be viewed in that context. Thus, the Court finds that DYFS has satisfied the third prong of the "best interests" standard and has provided "reasonable efforts" to M.Y.J.P. in an attempt to reunify the family under *N.J.S.A.* 30 4C-15.1a(3).

PRONG FOUR – M.Y.J.P.

Lastly, the Court must consider whether or not the termination of parental rights will do more harm than good for the child. *D.M.H.*, at 384. This prong is satisfied if a long term foster parent is willing to adopt. *K.H.O.*, at 360. The Court in *A.W.* went on to expand upon the statutory standard by stating:

> If one thing is clear, it is that the child deeply needs association with a nurturing adult. Since it seems generally agreed that permanence in itself is an important part of that nurture, a court must carefully weigh that aspect of a child's life . . . naturally, there will be circumstances when the termination of parental rights must precede the permanency plan. (Citations omitted). [*A.W.*, at 610].

Courts have recognized that in making their analysis of the fourth prong, the potential harm that is to be assessed is not that of the contesting parent but that of the child. *A.A.M.*, at 546. As the Court in *A.A.M.* stated: "Termination of parental rights in a contested matter will by definition cause intense pain to the unsuccessful parent and will permanently deprive the individual of one of the most basic of human relationships." *Id.* at 546. Therefore, the Court must answer the question of whether the termination of M.Y.J.P.'s rights will not do more harm than good for S.J.A.

Defense counsel makes the argument that the Court should not terminate M.Y.J.P.'s parental rights because S.J.A.'s foster mother is ambivalent about adopting S.J.A. The Court, however, is satisfied that S.J.A.'s foster mother intends to adopt S.J.A. once he is freed up for adoption. The issue of the foster mother's ambivalence having been

raised by defense counsel, the Court ordered that she be produced at trial to resolve any questions of her intent to adopt. When the foster mother was questioned, "If the Court were, in fact, to terminate parental rights and [S.J.A.] would be legally free [sic] to be adopted, would you be interested in adopting [S.J.A.]?" She testified "Yes, and that's why I'm here." (4T72:12-16).

In addition, Dr. Wendy Matthews agreed that the termination of M.Y.J.P.'s parental rights would not do S.J.A. more harm than good. Dr. Matthews testified that his foster mother understands and responds to S.J.A.'s needs "in an active and involved manner," and that he views his foster mother as his protector and guide. She went on to further state that S.J.A.'s relationship with his foster mother is categorized by "openness and honesty." She also testified, "Another disruption at this critical juncture in [S.J.A.'s] life when he is just on the precipice of moving into his teenage years would do irreparable damage to [S.J.A.]." (1T81:5-25; 1T133:7-25). This Court finds that based on Dr. Matthews' testimony, the bond between the foster mother and child is significant to the extent that the child perceives the foster mother as his psychological parent. By contrast, S.J.A. has no recollection of his mother.

S.J.A. stated during an in camera interview that he has no recollection of his first two years living in Haiti nor, more importantly his birth mother. In fact, when asked whether or not he would like to return to Haiti, the child said that he would like to visit, but would like to stay in his current home.

Also, during the March 9, 2001 bonding session, Dr. John Liccardo had the opportunity to speak with S.J.A.

alone. Dr. Liccardo asked him about M.Y.J.P. and their life in Haiti. S.J.A. indicated that he did not remember anything about M.Y.J.P. nor did he remember anything about living in Haiti, (2T268:25 to 2T269:12), but that he would like to meet her. (2T269:20). With regard to J.R.A., Dr. Liccardo noted that S.J.A. was not enthusiastic about being with him. (2T270:15-16). In contrast, S.J.A. was "very positive about his experiences with his foster family." (2T268:8-24). When questioned by Dr. Liccardo as to how he would feel if the Judge determined that he would have to live with his foster mother, S.J.A. replied, with a broad smile on his face: "I'd be very happy!" (2T271:14-20). Dr. Liccardo noted that S.J.A. appeared to be "relieved" by the possibility that the Court could decide that he could remain with his foster family. (2T272:9-13).

In light of the facts as to S.J.A.'s relationship with M.Y.J.P., the Court need not have the formality of a bonding evaluation as proof of the obvious. Otherwise, DYFS and defense counsel would have conducted bonding evaluations as an exercise in futility, which would have served no meaningful purpose in assisting the Court in determining whether or not the statutory requirements had been met. In this case, bonding between M.Y.J.P. and S.J.A. is non-existent, as shown by the obvious facts. Therefore, the Court finds that DYFS has established by clear and convincing evidence that the termination of M.Y.J.P.'s parental rights will not do S.J.A. more harm than good.

S.J.A.'S NEED FOR PERMANENCY

Moreover, in the Child Placement Review Act, *N.J.S.A.* 30:4C-50 *et seq.*, the Legislature explicitly

recognized the benefits of permanent placement for children. In *N.J.S.A.* 30:4C-53.1(d), it stated that the obligation of the State is to recognize and protect the rights of children in the child welfare system through a clear and consistent policy, which promotes the placement of children in stable and permanent homes. Similarly, in the Child Placement Bill of Rights Act, *N.J.S.A.* 9:6B-1 *et seq.*, the Legislature stated that a child placed outside her home is entitled to a placement plan that reflects the child's best interests. This is designed to facilitate the permanent placement or return home in a timely manner that is appropriate to the needs of the child.

Furthermore, the concept of permanency for children has been strengthened in the Federal Adoption and Safe Families Act, 42 *U.S.C.* §301 *et seq.* Under the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 stat. 2115, public policy dictates that the protection and permanency are the paramount concerns in all decisions regarding children under the care of DYFS. The foster care system should not be a way of life as far too many children spend their most formative years in what was intended as a temporary setting. In this case, S.J.A. has been in foster care for the last seven years. He should not, however, be required to languish in the foster care system until maturation because the defendant is not willing or is unable to provide him a stable home. M.Y.J.P., rather than make every effort towards reunification or otherwise accept any parental obligation, has chosen to allow S.J.A. to remain in foster care after being placed on notice several times as to his foster care status. The Court finds that in this child's case, S.J.A.'s right to permanency overrides M.Y.J.P.'s parental rights. The Court must make every effort to bring permanency to this child's life, which can

only be accomplished by terminating M.Y.J.P.'s parental rights. Therefore, the Court finds that S.J.A. deserves to enjoy the benefits that a permanent placement provides and thus, should be freed up for adoption by his foster family.

In addition, this Court does not find that it would be in the best interests of S.J.A. to break the strong ties S.J.A. has forged with his foster mother for him to be tumultuously sent back to a foreign country, with a different language, to a biological parent, who he does not even remember and could not communicate with, due to the language barrier. Aside from defense counsel's argument that DYFS failed to satisfy all statutory requirements under the "best interests" standard, S.J.A.'s best interests still remain paramount in the Court's determination of whether or not to terminate M.Y.J.P.'s parental rights.

In any event, even had this Court found that DYFS failed to satisfy all of the statutory requirements to M.Y.J.P., the Court must examine the totality of the circumstances in determining whether termination of parental rights is in the "best interests" of S.J.A. An evaluation of the efforts undertaken by DYFS must be done on an individualized basis. *D.M.H.* at 390. It has been recognized that DYFS's efforts to reunify the family must be "properly viewed in light of [its] efforts on behalf of [the] family as a whole." *Id.* at 391. According to the Court in *D.M.H.,* DYFS's efforts must be evaluated against "the standard of adequacy in light of all the circumstances of a given case." *D.M.H.,* at 387.

In making an analysis under the totality of the circumstances, the Court cannot overlook the practical problem of M.Y.J.P.'s geographical location. M.Y.J.P. lives

in a foreign country and does not speak English. S.J.A. speaks English only and does not understand the Creole language after seven years of residing in the United States, with the same foster parent.

The Court does not accept M.Y.J.P.'s testimony regarding her unrealistic expectations as to J.R.A.'s intention on bringing her to the United States as credible. M.Y.J.P. testified that she knew J.R.A. was traveling to the United States with his wife and thought that she would be sent for at a later date. The Court finds it incredible that a past lover, M.Y.J.P., who was no longer intimately involved with J.R.A. at that time, could truly believe that she would be sent for to join him in the United States when he was already married. The Court can only arrive at one conclusion that when M.Y.J.P. gave her son to J.R.A. she intended to relinquish her parental responsibility to S.J.A.

The Court must take into consideration the limitations of a state agency when they are dealing with an uncooperative foreign government. DYFS, as well as the Court, attempted to have M.Y.J.P. brought over to the United States for this trial but were unsuccessful in their attempts. Additionally, M.Y.J.P. did not apply for a Visa until early 2001, seven years after S.J.A. had been placed in foster care. Ultimately, M.Y.J.P. was unsuccessful in her attempt to immigrate to the United States.

More importantly, the Court is presented with a mother, who upon her initial contact with DYFS, told the agency to keep S.J.A. in the United States and not to send him back to Haiti. Throughout M.Y.J.P.'s involvement with DYFS, the agency worked appropriately with a parent, who repeatedly insisted that her child should not be returned to her care. Moreover, the Court must also

consider the fact that a mother who truly wants to be an active participant in their child's life would not allow their child to remain in foster care, without even placing a phone call or writing a letter to DYFS regarding your child's welfare for almost three years, as M.Y.J.P. did from April 1995 and March 1998. The Court is further convinced that DYFS acted appropriately under the circumstances by the fact that M.Y.J.P.'s decision to allow S.J.A. to remain in the United States did not change until her August 30, 2001 video deposition, in which she ambiguously testified that DYFS should send S.J.A. back to Haiti, however, by the end of the deposition changed her mind and wanted him to remain in New Jersey.

Finally, the Court must take into consideration that it is a general policy of DYFS to work with the available custodial parent. A policy that this Court finds to be reasonable and rational given that a parent must be available to engage services provided by DYFS. Thus, DYFS worked with J.R.A., the only available parent, who lived in New Jersey, in an attempt to reunify the family. Unfortunately, DYFS's attempts failed, as J.R.A. was unable to overcome his drug addiction and became involved with criminal authorities. During that time, DYFS continued to work with M.Y.J.P., however, she still expressed her intent to leave S.J.A. in DYFS's custody and care.

This Court finds that it remains in the best interests of S.J.A. to terminate M.Y.J.P.'s parental rights, as the child deserves permanency and should not be subjected to the whim of a parent, who has had no involvement in the child's life for the past seven years. Instead, the child should be allowed to develop and prosper under the care

and custody of the only family he has recollection of, his foster family in the United States.

LEGAL ANALYSIS – J.R.A.

PRONG ONE – J.R.A.

In J.R.A.'s case, the Court finds that DYFS has established that S.J.A.'s health and development have been and will continue to be endangered by his parental relationship under *N.J.S.A.* 30:4C-15.1a(1). Between 1995 and 2001, J.R.A.'s behavior harmed the parent-child relationship with S.J.A. by preventing it from progressing. *A.A.M.*, at 547.

J.R.A. has consistently failed to perform any parenting functions for S.J.A. After coming to the United States, DYFS substantiated a referral that J.R.A. was leaving the children without proper supervision. A second referral was received by DYFS in November 1994, after J.R.A.'s use of corporal punishment on J.R.A., Jr. was substantiated. At that time, DYFS was only going to place J.R.A., Jr. but while in the hospital, J.R.A. told the DYFS caseworker to place S.J.A. also, or else he would abandon the child during the night. DYFS appropriately responded and placed S.J.A. in an agency approved foster home.

Once the children were placed in foster care, J.R.A. turned to a life of crime. J.R.A. is a compulsive shoplifter, who has been in and out of jail since 1997. On September 10, 1997, J.R.A. was arrested by the Trenton Police Department for possession of a controlled dangerous substance and criminal mischief. J.R.A. pled guilty to these charges and was incarcerated on November 4, 1997. On April 28, 1998, J.R.A. was arrested at the Quaker Bridge

Mall on a theft charge. On June 9, 1998, J.R.A. was again arrested at the Quaker Bridge Mall on a theft charge. On May 7, 1999, J.R.A. was convicted of the latter charge. In June 1999, J.R.A. was again arrested on theft charges. In August 1999, J.R.A. was arrested on a robbery charge, of which, he was later acquitted. On February 25, 2000, J.R.A. was arrested by the Lawrence Township Police for shoplifting at the Quaker Bridge Mall and released on a summons with a March 1, 2000 court date. On February 27, 2000, J.R.A. was once again arrested on shoplifting charges at the same mall on March 5, 2000. On February 23, 2001, J.R.A. was arrested at the Quaker Bridge Mall on a theft charge. Moreover, J.R.A. was arrested and incarcerated on at least eight occasions on theft charges between the years of 1997 and 2001.

Furthermore, DYFS records indicate that J.R.A.'s visitation record was inconsistent at best. During 1996, J.R.A. visited the children sporadically despite having the right of bi-weekly visitation. During 1997, J.R.A. visited with S.J.A. only two times. The only contact J.R.A. has had with S.J.A. since 1997 was during the course of a bonding evaluation that was conducted on March 9, 2001 at the Mercer County Correctional Facility.

In fact, at the time of this proceeding, J.R.A. was incarcerated and uncertain as to when he was going to be released and would be unable to provide a safe and stable home to S.J.A. Immigration and Naturalization Services has advised the Court that J.R.A. is being detained and will be deported. Therefore, J.R.A.'s lack of contact with S.J.A. due to his recurring incarcerations has resulted in J.R.A.'s failure to perform any parenting functions for S.J.A. for at least the past four years. Thus, DYFS has

satisfied the first prong of the "best interests" standard under *N.J.S.A.* 30:4C-15.1 a(1).

PRONG TWO – J.R.A.

The second prong of *N.J.S.A.* 30:4C-15.1a is whether the parent is unable to eliminate the harm facing the child or unwilling to provide a safe and stable home for the child and that the delay of permanent placement will add to the harm. *N.J.S.A.* 30:4C-15.1 a(2).

J.R.A. testified that he understood that he was required to take a drug test, attend counseling, maintain full-time employment and provide the children with a safe and stable home before the children could be returned to him. Yet, J.R.A. has repeatedly failed to eliminate his substance abuse problem and has failed to attend counseling. J.R.A. tested positive for cocaine two times and even attempted to go so far as altering the results of a third drug test. When confronted about the results, J.R.A. gave the poor excuse that the drugs found in his system were from his drug use in Haiti and denied current use. DYFS referred J.R.A. to a drug counseling program at New Horizon, but J.R.A. failed to complete the treatment. J.R.A. was referred to psychological counseling with a Creole-speaking therapist, however, J.R.A. was terminated from the counseling due to his non-compliance. On March 11, 1998, J.R.A. told the caseworker that he did not have time to attend any counseling programs, thereby, allowing his drug addiction to take precedent over caring for his children.

When J.R.A.'s parental rights were terminated as to J.R.A., Jr. the trial court opined: "[W]hen you look at the overall picture of never completing anything, showing up

when he wanted to, not showing up at other times, taking the drug test when he wanted to, failing it when the State wanted him to, I think that the overall picture shows someone who is in effect from the standpoint of the Court both unwilling and unable to eliminate doing what he was doing, which would affect his care for this child . . ." J.R.A.'s failure to eliminate his drug addiction, as well as, his frequent incarcerations, has led to J.R.A.'s failure to eliminate the harm facing S.J.A. Thus, the Court finds that DYFS has satisfied the second prong of the "best interests" standard under *N.J.S.A.* 30:4C-15.1 a(2).

PRONG THREE – J.R.A.

Under the third prong, the Court must determine whether or not DYFS has provided "reasonable efforts" under *N.J.S.A.* 30:4C-15.1 a(3).

Unfortunately, J.R.A. was offered numerous services by DYFS, but repeatedly failed to take advantage of them. In December 1994, J.R.A. requested visitation with the children, which DYFS arranged. On March 2, 1995, DYFS had a meeting with J.R.A. to discuss services that were available to him and advised him of what was expected of him before the children could be returned to his care, however, J.R.A. failed to fulfill these requirements.

J.R.A. was referred for three drug screens and tested positive for cocaine for two of the three screens and was even found to have tampered with the third test. From January 1995 to June 1995, J.R.A. was provided bi-weekly supervised visitation with the children, but canceled many visits or appeared late.

DYFS also attempted to locate J.R.A.'s relatives for possible relative placements for the children. DYFS received a response from the paternal relatives, whom resided in Haiti. In that letter, the relatives asked DYFS to bring them to New Jersey to care for the children. The relatives also asked that if DYFS was unable to facilitate their immigration that they should "keep the children while they are small." Unfortunately, DYFS was in not in a position to bring M.Y.J.P. to the United States and therefore, could not bring the paternal relatives to the United States either.

On December 10, 1997, J.R.A. entered into a Service Agreement, in which, he agreed to participate in drug counseling at the Heartland Clinic, which he also failed to complete. In August 1999, DYFS once again contacted a relative of J.R.A. to inquire whether they would be interested in caring for the children, but the relative was uninterested.

This Court agrees with the trial court that terminated J.R.A.'s parental rights to J.R.A., Jr. when it stated that: "the Division really went out of its way to continue to try to reunite this family beyond what would otherwise be considered a normal time period . . ." Therefore, upon further examination of the evidence presented, the Court finds that DYFS provided a myriad of services to J.R.A. and thus, has satisfied the third prong of the "best interests" standard under *N.J.S.A.* 30:4C-15.1 a(3).

PRONG FOUR – J.R.A.

Lastly, the Court must consider whether or not the termination of parental rights will do more harm than good for the child. *D.M.H.*, at 384. The fourth prong is

satisfied if a long term foster parent is willing to adopt or a parent's drug addiction limits her ability to form a bond with the child. *K.H.O.*, at 360.

Unfortunately, J.R.A. is a drug-addicted individual, who has allowed his drug addiction to take priority over his ability to care for his children. J.R.A.'s drug addiction has limited his ability to form a bond with S.J.A. In addition, as previously mentioned, S.J.A.'s foster mother testified that she is interested in adopting S.J.A. once he is freed up for adoption.

As a result of the March 9, 2001 bonding evaluation, Dr. John Liccardo concluded that that S.J.A. has an "insecure ambivalent bond" to J.R.A. (2T279:1-3). Dr. Liccardo also stressed the fact that S.J.A. has lived in the same foster home for seven years and has formed a positive relationship with his foster family. Given these circumstances, Dr. Liccardo concluded that S.J.A. would not suffer more harm than good if the attachment with J.R.A. was severed. (2T281:23 to 2T282:10). He further elaborated when he stated: "[S.J.A.] would have next to no lasting effect. It would be in his best interests to remain in a secure place where he has the love and affection of a family." (2T282:15-18).

Furthermore, when a DYFS caseworker called J.R.A. on January 25, 1999, to inform him of problems that J.R.A., Jr. was experiencing, J.R.A. responded that DYFS should take good care of J.R.A., Jr., as he needed his son to take care of him when he got older. When asked what J.R.A.'s plan was once he was released from prison, he testified that his plan was not to personally care for his son but requested that the Court order S.J.A. into long-term foster care, so that he could visit with S.J.A. This

Court finds that J.R.A. is unable and unwilling to care for S.J.A. and by way of his warped rationale expects the children to care for him. In conclusion, the Court finds that DYFS has satisfied the final prong of the "best interests" standard under *N.J.S.A.* 30:4C-15.1a, as termination of J.R.A.'s parental rights will not do more harm than good for S.J.A. and that the severance of J.R.A.'s parental ties is the only viable remedy.

In accordance with the determination that all four prongs of *N.J.S.A.* 30:4C-15.1a have been met with clear and convincing evidence, this Court orders the termination of M.Y.J.P. and J.R.A.'s parental rights, with respect to S.J.A.

DAVID SAMSON
Attorney General of New Jersey
Attorney for the New Jersey Division of
Youth and Family Services
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

BY: Mary Jane Lembo Cullen
Deputy Attorney General
(609) 777-4034

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION– FAMILY PART
COUNTY OF MERCER
DOCKET NO. FG-11-41-98

IN THE MATTER OF THE GUARDIANSHIP OF: JEAN RENE AUGUSTE, JR. and STEPHENSON JAMES AUGUSTE, Minors	Civil Action JUDGMENT OF GUARDIANSHIP (AS TO STEPHENSON JAMES ONLY) (Filed Feb. 20, 2002)

This matter having been opened to the Court for trial on August 6 and 7, 2001, September 10 and 11, 2001, and February 1, 2002 by David Samson, Attorney General of New Jersey, Attorney for the New Jersey Division of Youth and Family Services, Octavia Melendez, Senior Deputy Attorney General, and Mary Jane Lembo Cullen, Deputy Attorney General, appearing; and Marty M. Judge and James M. Scott, III, Esquires, the attorneys for Marie Yolene Jean-Pierre, appearing; and Brian Paul, Esquire, the attorney for Jean Rene Auguste, Sr.,

appearing; and Lori A. Johnson, the Law Guardian for the minor child, appearing; and Jean Rene Auguste, Sr., appearing at trial by writ; and Marie Yolene Jean Pierre having submitted to a telephonic deposition; and the Court having considered the testimony of Mr. Auguste, Ms. Jean Pierre, and the Division's witnesses, and the exhibits marked in evidence; and the Court finding that the best interests of the minor child require the entry of this judgment; and for good cause shown;

IT IS on this 19th day of February, 2002;

ORDERED that the parental rights of Marie Yolene Jean Pierre and Jean Rene Auguste, Sr., to the minor child, Stephenson James Auguste, are hereby terminated; and it is further

ORDERED that the minor child, Stephenson James Auguste, shall and the same is hereby committed to the guardianship of the New Jersey Division of Youth and Family Services, pursuant to *N.J.S.A.* 30:40C-15 *et seq.* for all purposes including adoption

/s/ Gerald J. Council
Honorable Gerald J.
Council, J.S.C.

John J. Farmer, Jr.
Acting Attorney General of New Jersey
Attorney for the New Jersey Division of
Youth and Family Services
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

BY: Mary Jane Lembo Cullen
Deputy Attorney General
(609) 777-4034

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION– FAMILY PART
COUNTY OF MERCER
DOCKET NO. FG-11-41-98

IN THE MATTER OF THE GUARDIANSHIP OF: JEAN RENE AUGUSTE, JR. and STEPHENSON JAMES AUGUSTE, Minors	Civil Action CASE MANAGEMENT ORDER (AS TO STEPHENSON JAMES ONLY) (Filed Aug. 20, 2001)

This matter having been brought before the Court on July 18, 2001 by John J. Farmer, Jr., Attorney General of New Jersey, attorney for the New Jersey Division of Youth and Family Services, Mary Jane Lembo Cullen, Deputy Attorney General, appearing; and James Scott, Esquire, appearing on behalf of Marie Yolene Jean-Pierre; and Brian Paul, Esquire, appearing on behalf of Jean Rene Auguste, Sr., and Laurie Johnson, Esquire, substituting for Andrea Dobin, Esquire, the Law-Guardian for the minor child, Stephenson

James; and the Court being satisfied that the best interests of the minor child, Stephenson James, require the entry of this order; and for good cause shown;

IT IS 20th day of August 2001;

ORDERED that, at the time of the presentation of the testimony of the Division's witnesses (on August 6, 7, and 8, 2001), a Creole interpreter shall be present in the courtroom to translate and record on a tape-recorder said testimony for the benefit and use of Ms. Jean-Pierre. Said recording and an appropriate tape player shall then be sent to Ms. Jean-Pierre in Haiti so that she may review the testimony alone and then with the assistance of her counsel. (This procedure shall substitute for the preparation of the written transcript and translation originally ordered by the Court on July 13, 2001 and now abandoned due to its prohibitive cost); and it is further

ORDERED that Ms. Jean-Pierre's counsel shall, at their election, either retain the services of a Haitian attorney to assist with an audio-visual deposition of Ms. Jean-Pierre or conduct a telephone deposition of Ms. Jean-Pierre. In reference to said deposition, the Division's counsel shall be permitted to listen to said deposition at the time it is being conducted and to cross-examine Ms. Jean-Pierre if necessary; and it is further

ORDERED that the Division's witnesses shall not consult with one another or with the Division's counsel between the time of their initial testimony and any time that they are recalled for further questioning by defense counsel; and it is further

ORDERED that a trial in the instant matter shall take place on August 6, 7, and 8, 2001, and then on September 10, 11, and 12, 2001 before the Honorable Gerald J. Council, J.S.C.

/s/ Gerald J. Council
Hon. Gerald J.
Council, J.S.C.

John J. Farmer, Jr.
Acting Attorney General of New Jersey
Attorney for the New Jersey Division of
Youth and Family Services
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

BY: Mary Jane Lembo Cullen
Deputy Attorney General
(609) 777-4034

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION– FAMILY PART
COUNTY OF MERCER
DOCKET NO. FG-11-41-98

IN THE MATTER OF THE GUARDIANSHIP OF:	Civil Action
JEAN RENE AUGUSTE, JR. and STEPHENSON JAMES AUGUSTE,	CASE MANAGEMENT ORDER (AS TO STEPHENSON JAMES ONLY)
Minors	(Filed July 18, 2001)

This matter having been brought before the Court on July 13, 2001 by John J. Farmer, Jr., Attorney General of New Jersey, attorney for the New Jersey Division of Youth and Family Services, Mary Jane Lembo Cullen, Deputy Attorney General, appearing; and James Scott, Esquire, appearing on behalf of Marie Yolene Jean-Pierre; and Brian Paul, Esquire, appearing on behalf of Jean Rene Auguste, Sr., and Laurie Johnson, Esquire, substituting for Andrea Dobin, Esquire, the Law Guardian for the minor child, Stephenson

James; and the Court having considered briefs and arguments of counsel; and the Court being satisfied that the best interests of the minor child, Stephenson James, require the entry of this order; and for good cause shown;

IT IS 16th day of July 2001;

ORDERED that the following alternative trial procedures shall be implemented to ensure Ms. Jean-Pierre's meaningful participation at trial:

1) The Division shall present its case-in-chief.

2) The defendant(s) shall be permitted to cross-examine the Division's witnesses.

3) A transcript of (1) and (2) shall be prepared.

4) The transcript shall be translated from English to Creole.

5) A recess shall be had and Ms. Jean-Pierre's counsel shall have the opportunity to review the transcript with their client.

6) Counsel for Ms. Jean-Pierre shall be permitted to call back the Division's witness(es) for cross-examination of issue(s) that are raised in consultation with Ms. Jean-Pierre.

7) Jean Rene Auguste (Birth Father) shall be permitted to testify.

8) Ms. Jean-Pierre shall be permitted to testify through one of the following methods:

a) Defense counsel shall be permitted to arrange a telephone deposition of their client; or

b) Defense counsel shall be permitted to retain counsel in Haiti to conduct a deposition of Ms. Jean-Pierre; or

c) Defense counsel shall be permitted to travel to Haiti to conduct a video deposition of Ms. Jean-Pierre.

9) Any further procedures shall be on application to the Court; and it is further

ORDERED that the Division shall assume the costs of the depositions and transcriptions herein ordered; and it is further

ORDERED that the Division's application for the Office of the Public Defender to be considered as responsible for all or part of the costs incurred in this trial procedure is denied, with the Court acknowledging the right of the Division to appeal this issue at the conclusion of the trial; and it is further

ORDERED that any motion by Ms. Jean-Pierre to preclude the testimony of Dr. Wendy Matthews shall be returnable on August 3, 2001; and it is further

ORDERED that a trial in the instant matter shall take place on August 6, 7, and 8, 2001, and then on September 10, 11, and 12, 2001 before the Honorable Gerald J. Council, J.S.C.

/s/ Gerald J. Council
Hon. Gerald J.
Council, J.S.C.

IN THE MATTER OF THE GUARDIANSHIP OF: STEPHENSON JAMES AUGUSTE, A Minor.	**SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MERCER COUNTY** **Docket No. FG-11-41-98** **ORDER** (Filed Mar. 13, 2001)

This matter having been brought before the Court on March 12, 2001 by Defendant Marie Yolene Jean-Pierre; and the Court having considered the briefs and argument submitted by the Parties;

IT IS ON THIS 13th day of March 2001;

ORDERED THAT:

TRIAL PROCEDURES

Ms. Jean-Pierre shall appear at trial by telephone during the entire duration of the trial or, if that is not possible, alternative procedures shall be adopted before the trial commences to satisfy minimal due process standards; and

Upon notice by counsel to the Court, Ms. Jean-Pierre may request a brief adjournment of the trial at the end of each witness' testimony (or sooner, if necessary to raise or meet an objection) to confer with her counsel privately; and

All witnesses shall be instructed that Ms. Jean-Pierre is participating at trial by telephone and with the aid of a translator and that during testimony the witness shall be cognizant of and cooperate with the translator; and

EXCLUDED TESTIMONY AND PROOFS

No testimony or other proofs adverse to Ms. Jean-Pierre may be proffered at trial by any party regarding Ms. Jean-Pierre's fitness as a parent and her relationship to her son.

/s/ Gerald J. Council
Gerald J. Council, J.S.C.

SUPREME COURT OF NEW JERSEY
M-521/522/523 September Term 2000

IMO THE GUARDIANSHIP OF S.J.A.

ORDER

(Filed Dec. 18, 2000)

MARIE YOLENE JEAN-PIERRE,

Defendant-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to proceed as indigent (M-521) is granted; the motion for leave to appeal (M-522) is denied; and the motion for a stay pending appeal (M-523) is dismissed as moot.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 18th day of December, 2000.

/s/ Stephen Townsend
CLERK OF THE
SUPREME COURT

CHIEF JUSTICE PORITZ AND JUSTICES COLEMAN, LONG, VERNIERO and LaVECCHIA join in this disposition. JUSTICES STEIN and ZAZZALI dissent, and would grant leave to appeal and a stay pending appeal.

IMPOUNDED

ORDER ON MOTION

IN THE MATTER OF THE
GUARDIANSHIP OF SJA

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-80-00T3
MOTION NO. M-608-00
BEFORE PART: B
JUDGE(S): KING
AXELRAD

BY: MARIE Y JEAN-PIERRE
BY: DYFS

MOTION FILED: OCTOBER 2, 2000
ANSWER(S) FILED: OCTOBER 12, 2000

SUBMITTED TO COURT: OCTOBER 30, 2000

ORDER

(Filed Nov. 2, 2000)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 30TH DAY OF October, 2000, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT	GRANTED	DENIED	OTHER
FOR LEAVE TO APPEAL	( )	(✓)	(✓)
FOR SUMMARY DISPOSITION			
FOR STAY			
TO PROCEED AS AN INDIGENT			
TO FILE AN OVERLENGTH BRIEF			

SUPPLEMENTAL:

The motion for leave to appeal and for summary disposition is denied. The motion for a stay is denied. The motion to proceed as an indigent and to file an overlength brief is granted.

FOR THE COURT:

/s/ Michael King
MICHAEL PATRICK KING,
P.J.A.D.

In the Matter of the GUARDIANSHIP OF J.S.A., A Minor.

Superior Court of New Jersey
Chancery Division Mercer County
Family Part

Decided March 17, 2000

Mary Jane Lembo-Cullen, for Plaintiff – Division of Youth and Family Services (Deputy Attorney General's Office; Maria M. Dominguez on the brief)

James M. Scott III, for Defendant – M.J.P. (Drinker, Biddle & Shanley; Mr. Scott and Marty M. Judge on the brief)

COUNCIL, J.S.C.

PROCEDURAL HISTORY

This matter originated by the filing of a motion by the plaintiff, the Division of Youth and Family Services (hereinafter Division) on June 4, 1998 seeking to terminate the parental rights of the defendant, Marie Yolene Jean-Pierre, (hereinafter M.J.P.) a citizen of Haiti. Thereafter, through Court appointed counsel, the defendant filed a motion to dismiss claiming the Court lacked the necessary in personam jurisdiction to proceed against her in a termination hearing.

FACTS

According to the parties' briefs submitted M.J.P. is the biological mother of J.S.A, the minor child involved in the case. The child was born of a relationship between M.J.P. and J.R.A. At the time of the child's birth on August 5,

1992, the parents were living in Haiti. It was a time of great civil unrest, poverty and uncertainty. J.R.A. informed M.J.P. that he was going to the United Sates through the Lutheran Ministries Haitian Refugee Program. M.J.P. told him to also take their child to the United States. J.R.A. agreed and indicated that he would facilitate M.J.P.'s entry into the country following his arrival. Instead, J.R.A. arrived in the United States in 1993, with his own wife, W.A., a child of their marriage, and J.S.A., the minor child involved in this case.

Upon arrival in the United States, W.A. abandoned J.R.A. and the family. Her current whereabouts are unknown. In 1994, J.R.A. voluntarily placed the two children into foster care. In 1994 he was also incarcerated and has had little to no contact with either child during the past six (6) years. J.S.A. [sic] has been in foster care since 1994, but the child of J.R.A.'s marriage was adopted and is not involved in this matter.

M.J.P. has not seen her child or had any contact with him since he left Haiti. She has never visited the United States and the child has never visited Haiti. She speaks very little English, and the child does not speak Creole. More important, M.J.P. has no plans for the child's future, and does not wish to have the child returned to Haiti. Thus, the present issue before the Court is whether the State of New Jersey can exercise personal jurisdiction over the nonresident defendant in this litigation for termination of parental rights.

I. Historically, a state court's authority to enter a binding judgment against a nonresident defendant was severely limited as the defendant's presence within the forum was a prerequisite. *Pennoyer v. Neff*, 95 *U.S.* 714, 733, 24 *L.Ed.*

565, 572 (1878). However, the authority of state courts was expanded when presence was no longer required as service of a summons and complaint upon the nonresident defendant was determined sufficient to put the individual on notice of a suit pending against him. *Milliken v. Meyer*, 311 *U.S.* 457, 463, 61 *S. Ct.* 339, 342, 85 *L.Ed.* 278, 284 (1940). Due Process however, requires that a defendant not only be given sufficient notice of the action, but that the Court also have personal jurisdiction over the defendant. *International Shoe Co. v. State of Washington*, 326 *U.S.* 310, 316, 66 *S. Ct.* 154, 161, 90 *L. Ed.* 95, 102 (1945).

First, sufficient notice was given to the nonresident defendant, M.J.P. Pursuant to *R.* 4:4-4(c), service of process outside the United States may be accomplished by registered certified or ordinary mail and shall be effective for obtaining in personam jurisdiction only if the defendant answers the complaint or otherwise appears in response thereto within 60 days. In this case, the Division complied with this rule on two occasions, June 18, 1998 and October 5, 1998. M.J.P. acknowledged receipt of the summons and appeared in response thereto by writing to the Division on June 26, 1998 and October 29, 1998, well within the 60 day timeframe.

Counsel for the defendant argues that the Division failed to comply with the requirements governing service of process because traditionally foreign citizens are served through letters rogatory absent a treaty between the United States and the country where service of process is being attempted. A letter rogatory is simply a document issued by one court to a foreign court requesting that the foreign court serve process on an individual within its sovereign and return the proof of service for use in a pending case. Haiti is not a signatory of a treaty with the

United States that governs service of process. Therefore, the defendant argues service of process was insufficient as it was not done by a letter rogatory according to the laws of Haiti, a coequal sovereign. The Court however, is satisfied with the Divisions' efforts to serve the defendant, M.J.P., as her written responses make evident that she was put on notice of the pending action.

Second, in order for a State to obtain jurisdiction over the defendant's person, the defendant must have "minimum contacts" with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer, supra*, 311 *U.S.* at 463, 61 *S. Ct.* at 342, 85 *L. Ed.* at 284. Essentially, the "purposeful availment" test is used to establish minimum contacts. In other words, the defendant must have "purposefully availed" himself of a State's benefits. *Burger King Corp. v. Rudzewicz*, 471 *U.S.* 462, 472, 105 *S. Ct.* 2174, 2182, 85 *L. Ed.* 2d 528, 540 (1985). In determining whether "minimum contacts" exist via purposeful availment, the Court should also look at whether it was reasonably foreseeable that the defendant would be amendable to suit within the forum State. *World-Wide Volkswagen Corp. v. Woodson*, 444 *U.S.* 286, 287, 100 *S. Ct.* 559, 567, 62 *L.Ed.* 2d 490, 501 (1980). Ultimately, if the defendant could foresee being haled into Court then the exercise of in personam jurisdiction is in line with the "traditional notions is of fairplay and substantial justice."

Defense counsel offers two compelling arguments against the Court exercising in personam jurisdiction over M.J.P. and utilizes the reasoning of the United States Supreme Court in the case of *Kulko v. Superior Court of California*, 436 *U.S.* 84, 98 *S. Ct.* 1690, 56 *L.Ed.* 2d 132 (1978). The *Kulko* Court held that to exercise in personam

jurisdiction over a nonresident defendant simply because the defendant acquiesced in permitting his child to reside in the forum State with the other parent would violate Due Process since acquiescence could not be regarded as a purposeful act by which the defendant derived a benefit from the forum State. *Id.* at 94. Furthermore, the Court reasoned that this single act was not one that a reasonable parent would expect to result in a suit in a distant forum. *Id.* at 98. The Court also reiterated the premise previously established in *Hanson v. Denckla*, 357 *U.S.* 235, 253, 78 S. Ct. 1228, 1239, 2 *L.Ed.* 2d. 1283, 1301 (1958), that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . ."

Finally, the defense counsel argues that the Division's unilateral act of contacting the defendant, and M.J.P.'s responses to that contact does not satisfy the requisite "minimum contacts" with the forum State. Second, that the defendant did not "purposefully avail" herself to the forum State by allowing her child to be brought to the United States. However, the Court obtained jurisdiction over the defendant's person by her latter actions, or lack thereof, as she refused to have the child returned to Haiti. The demand that the child remain in the State of New Jersey and continue to be cared for by the forum State clearly equates to M.J.P. "purposefully availing" herself of the benefits of the forum and all its laws have to offer.

The Court concedes that M.J.P. has never been to New Jersey nor did she specifically send her child to the State of New Jersey. More important, is the fact that the child has been a ward of the State of New Jersey since his father placed him in foster care in 1994. Clearly, M.J.P. receives the benefit of knowing that her child is being

cared for without being required to perform any parental responsibility whatsoever. The Court recognizes that the child's father promised the defendant that he would facilitate her entry into the United States, and that M.J.P. was likely unsophisticated and incapable of searching for her son. Nevertheless, once she was contacted by the Division she could have voiced a desire to be reunited with her child, but she did not.

Defense counsel openly admits that the defendant has no plans for the child's future, nor does she desire to have the child returned to Haiti. In essence, M.J.P. is requesting the State continue to care for her child. Thus, she has "purposefully availed" herself of the benefits of the State, thereby allowing the Court to exercise personal jurisdiction. It is certainly reasonable that a parent would be haled into Court for not supporting a child as it is each parent's duty to care for his/her children. Thus, it is also reasonable that M.J.P. be amendable to suit within the State of New Jersey. Therefore, exercising personal jurisdiction is in line with the "traditional notions of fairplay and substantial justice."

The Court's rationale in the present case is also in accord with an earlier case where a New Jersey Court exercised personal jurisdiction over a foreign, nonresident defendant. In *Ali v. Ali*, 279 *N.J. Super,* 154 (Ch. Div. 1994), the Court exercised jurisdiction on the basis that the defendant openly admitted to picking up and dropping off his child in New Jersey for purposes of visitation, and utilized the plaintiff's New Jersey address on his green card application and joint tax returns. The Ali Court reasoned that the defendant's use of the New Jersey address for purposes of convenience made the defendant amendable to suit in New Jersey. *Id.* at 163. Therefore, the

Court could exercise in personam jurisdiction over the defendant, as such was in accord with the "traditional notions of fairplay and substantial justice."

In the present case, the Court concedes that the contacts of M.J.P. are not in line with *Ali,* as M.J.P. has never set foot on United States soil much less utilized a New Jersey address. She has, however, received the services and benefits of the laws of New Jersey, particularly those offered by the Division in caring for her child. Like the defendant in *Ali,* M.J.P. cannot utilize the conveniences of New Jersey, and expect not to be held responsible for her parental inaction in a New Jersey Court of law. Thus, the Court strongly holds that M.J.P. is amendable to suit in New Jersey.

Public policy dictates that the Court exercise jurisdiction as the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 stat. 2115 (hereinafter ASFA), provides that protection and permanency are the paramount concerns in all decisions regarding children under the care of the Division. The foster care system should not be a way of life as far too many children spend their most formative years in what was intended as a temporary setting. In this case, the minor child has been in foster care for the last six (6) years. He should not, however, be required to languish in the foster care system until maturation because the defendant is not willing or is unable to provide him a stable home. The defendant, rather than make every effort towards reunification or otherwise accept any parental obligation, has chosen to avoid this litigation by asserting a procedural defect; this Court concludes that the child's right to permanency overrides this technical defense. The Court must make every effort to bring permanency to this

child's life, which can only be accomplished by proceeding with the termination of parental rights litigation.

Accordingly, the defendant's motion to dismiss for lack of personal jurisdiction is denied.

Prepared by the Court.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,	**CHANCERY DIVISION/ FAMILY PART**
Plaintiff,	**MERCER COUNTY**
V.	**DOCKET NO.: FG-11-41-98**
MARIE YOLENE JEAN-PIERRE,	**Civil Action**
Defendant.	**ORDER**

This matter having come before the Court on June 4, 1998 for a Motion on the application of Plaintiff through its attorney, Mary Jane Lembo-Cullen, Esquire of the Deputy Attorney General's Office; and Defendant having filed a Cross-Motion/Responsive Certification through her attorney, James M. Scott, III, Esquire of the law firm of Drinker, Biddle and Shanley; the Court having considered the papers and heard oral argument; and for good cause shown:

1. IT IS on this 16th day of June 2000, ORDERED that the Defendant's Motion to dismiss for lack of jurisdiction is denied. The Court shall exercise in personam jurisdiction over the Defendant, and proceed with termination of parental rights litigation.

/s/ Gerald J. Council
HON. GERALD J. COUNCIL, J.S.C.

Prepared by the Court.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,	**CHANCERY DIVISION/ FAMILY PART MERCER COUNTY**
Plaintiff,	**DOCKET NO.: FG-11-41-98**
V.	**Civil Action**
MARIE YOLENE JEAN-PIERRE,	**ORDER**
Defendant.	(Filed Sep. 12, 2000)

This matter having come before the Court on June 4, 1998 for a Motion on the application of Plaintiff through its attorney, Mary Jane Lembo-Cullen, Esquire of the Deputy Attorney General's Office; and Defendant having filed a Cross-Motion/Responsive Certification through her attorney, James M. Scott, III, Esquire of the law firm of Drinker, Biddle and Shanley; the Court having considered the papers and oral argument; and for good cause shown:

1. IT IS on this 12th day of September 2000, ORDERED that the Defendant's Motion to dismiss for lack of jurisdiction is denied. The Court shall proceed with the termination of parental rights litigation.

2. IT IS FURTHER ORDERED that the Defendant's request to stay the proceedings pending appeal is denied.

/s/ Gerald J. Council
HON. GERALD J. COUNCIL, J.S.C.

SUPREME COURT OF NEW JERSEY
C-95 September Term 2003
54,837

NEW JERSEY DIVISION
OF YOUTH AND FAMILY
SERVICES,

Plaintiff-Respondent,

v.

M.Y.J.P.,

Defendant-Petitioner.

and

J.R.A.,

Defendant.

IN THE MATTER OF THE
GUARDIANSHIP OF S.J.A.,
A MINOR

ON PETITION FOR
CERTIFICATION

(Filed Sep. 17, 2003)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3402/3875-01 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 16th day of September, 2003.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

SUPREME COURT OF NEW JERSEY
C-94 September Term 2003
54,837

NEW JERSEY DIVISION
OF YOUTH AND FAMILY
SERVICES,

Plaintiff-Respondent,

v.

M.Y.J.P.,

Defendant,

and

J.R.A.,

Defendant-Petitioner.

ON PETITION FOR
CERTIFICATION

(Filed Sep. 17, 2003)

IN THE MATTER OF THE
GUARDIANSHIP OF S.J.A.,
A MINOR

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3402/3875-01 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 16th day of September, 2003.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT